# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

## No. 715.

THE COLUMBUS RAILWAY, POWER & LIGHT COMPANY, APPELLANT,

vs.

THE CITY OF COLUMBUS, OHIO, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED OCTOBER 28, 1913.

(26,801)

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*a* Supreme Court of the United States.

THE COLUMBUS RAILWAY, POWER AND LIGHT COMPANY, Appellant,

vs.

THE CITY OF COLUMBUS, OHIO, a Municipal Corporation, et al., Appellees.

Appeal from the District Court of the United States for the Southern District of Ohio, Eastern Division.

William O. Henderson, Henry J. Booth, Henderson & Burr, and Booth, Keating, Pomerene & Boulger, Solicitors for Appellant, Columbus, Ohio.

Joseph S. Clark, Henry A. McCarthy, of Counsel for Appellant, Philadelphia, Pa.

Henry L. Scarlett, David F. Pugh, Solicitors for Appellees, Columbus, Ohio.

Joseph A. Godown, of Counsel for Appellees, Columbus, Ohio.

*b* At a stated term of the District Court of the United States within and for the Sixth Judicial Circuit and Eastern Division of the Southern District of Ohio, begun and held at the Court Rooms in the City of Columbus, on the first Tuesday of June, being also the fourth day of that month, in the year of our Lord One Thousand Nine Hundred and Eighteen and in the One Hundred and Forty-second year of the Independence of the United States of America.

Present: The Honorable D. C. Westenhaver, U. S. District Judge. (Sitting by Designation.)

Among the proceedings had were the following, to-wit:

In Equity.

No. 104.

THE COLUMBUS RAILWAY, POWER AND LIGHT COMPANY, a Corporation of the State of Ohio, Plaintiff,

vs.

THE CITY OF COLUMBUS, OHIO, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred P. Zimpfer, Members of the City Council of said City, Defendants.

Be it remembered that heretofore, to-wit, on the 20th day of August, A. D. 1918, came the Plaintiff and filed in the Clerk's Office of said Court, its certain Bill of Complaint in this cause, against said Defendants, which said Bill of Complaint is clothed in the words and figures following, to-wit:

1 In the United States District Court for the Southern District of Ohio, Eastern Division.

In Equity.

No. —.

THE COLUMBUS RALWAY, POWER AND LIGHT COMPANY, a Corporation of the State of Ohio, Plaintiff,

vs.

THE CITY OF COLUMBUS, OHIO, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred P. Zimpfer, Members of the City Council of said City, Defendants.

*Bill of Complaint.*

To the Honorable the Judges of the District Court of the United States for the Southern District of Ohio, Eastern Division:

The plaintiff, The Columbus Railway, Power and Light Company, complains and says:

1. The plaintiff is a corporation of the State of Ohio duly incorporated, organized and existing for the purpose, among others, of

acquiring by purchase *of* lease, constructing, extending, owning, main aining and operating by means of electricity, street railroads or interurban railroads, or both, in the City of Columbus, County of Franklin and State of Ohio, and lines of such railroads extending from said city, within, through and between the municipali-
2 ties loca ed in said county and in territory contiguous to said county, with such termini as are or may be designated in the several ordinances, resolutions and orders granting and establishing the same; and it owns and operates, among other things, a sys em of street railway lines in the City of Columbus, Ohio.

2. The defendant, the City of Columbus, Ohio, is a municipal corporation of the State of Ohio duly incorporated, organized and existing under the laws of said State. The defendant, George J. Karb, is the duly elected, qualified and acting Mayor of said City of Columbus. The defendant, Henry L. Scarlett, is the duly elected, qualified and acting City Attorney and City Solicitor of said city. The defendant, James J. Thomas, is the duly elected, qualified and acting City Clerk of said city. And the defendants, Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Arthur P. Lamneck, Joseph C. Nailor, Edgar L. Weinland and Fred P. Zimpfer, are the duly elected, qualified and acting members of the City Council of said city.

3. This suit is a civil suit, and the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.

4. The plaintiff and its predecessors in title have since the enactment of the two ordinances mentioned in this paragraph and until the 20th day of August, 1918, been operating said system of street railway lines in the City of Columbus, which system consists of more than one hundred and ten (110) miles of track with necessary switches, turn outs and overhead construction, under two certain franchises granted by said city, towit:

(*a*) A franchise granted by an ordinance, entitled:

3 "An Ordinance, No. 17,801.

Renewing to The Columbus Railway Company, for a term of twenty-five (25) years, its grants, rights, privileges and franchises, to maintain and operate its tracks and lines of street railroad upon the streets and avenues, and parts of streets and avenues, hereinafter mentioned, in the City of Columbus, Ohio, and prescribing the terms and conditions thereof, and repealing the provisions of any and all ordinances and resolutions, and parts of ordinances and resolutions, inconsistent with the terms of this ordinance."

said ordinance having been duly passed by the City Council of said city on February 4, 1901, and duly approved by the Mayor of said city on February 6, 1901, and all rights and privileges thereunder having been thereafter transferred and conveyed by said The Columbus Railway Company to the plaintiff by deed dated January 29, 1914. This franchise ordinance has been sometimes called and is hereafter referred to as the Blanket Franchise Ordinance, and a copy

thereof is hereto attached, marked "Exhibit No. 1" and referred to for greater certainty.

(*b*) A second franchise granted by an ordinance entitled:

"An Ordinance, No. 17,802,

Granting permission to The Central Market Street Railway Company, its successors and assigns, to construct, operate and maintain a single or double track street railway, with necessary sidetracks, curves, turn-outs and switches in the following streets of the city of Columbus, Ohio, to-wit: Rich street, Fifth street, Donaldson street, Livingston avenue, Mohawk street, Reinhard avenue, Jaeger street, Hanford street, Fourth street, Hosack street, Innis avenue and Parsons avenue to the south corporation line of said City of Columbus."

said ordinance having been duly passed by the City Council of said city on January 21, 1901, and duly approved by the Mayor of said city on January 22, 1901, and all rights and privileges thereunder having been transferred and conveyed, after foreclosure proceedings, to the plaintiff under its former name of The Columbus Traction Company, by deed dated March 1, 1907. A copy of this second franchise ordinance, which is hereafter referred to as the Central Market Franchise Ordinance, is hereto attached, marked "Exhibit No.
4 2" and referred to for greater certainty.

In addition to said Blanket Franchise and said Central Market Franchise, certain other franchises were previously granted by said City of Columbus to predecessors in title of The Columbus Railway Company, as follows, towit:

"On Main street, (formerly called Friend street) from High street to Rose Avenue; on State street from High street to Grant avenue; thence in a northerly direction on Grant avenue to Oak street; thence on Oak street in an easterly direction to Sherman avenue, (formerly called Bruce street); on Long street from High street in an easterly direction to Mulberry street, and thence in a southerly direction on Mulberry street from Long street to Broad street; on Cleveland avenue in a northerly direction from Long street to Mt. Vernon avenue; thence in an easterly direction on Mt. Vernon avenue to Washington avenue; on West Broad street from High street to a point opposite the center of the east driveway to the Central Hospital for the Insane, (the same being the corporation line of the City of Columbus as established by ordinance of the City of Columbus, passed on or about May 18th, 1890); on Glenwood avenue in a southerly direction from Broad street to the Harrisburg pike; thence in a southwesterly direction on the Harrisburg pike to Green Lawn cemetery.

All of these last mentioned franchises were granted without limitation of time and are perpetual. They were duly and legally transferred and conveyed to said The Columbus Railway Company and by said Company conveyed to the plaintiff by the aforesaid deed

dated January 29, 1914. The streets covered by these perpetual franchises are set forth in Section 20 of said Blanket Franchise Ordinance, Exhibit No. 1, and the claim of said The Columbus Railway Company that they are perpetual is recognized by said city in said section but is not there admitted. Reference to said section which appears in Exhibit No. 1 is hereby made.

6. Under the terms and provisions of said Blanket Franchise Ordinance, Exhibit No. 1, the grantee and its successor and assigns were required in due course as therein provided to issue and sell,
5 and they did issue and sell, eight tickets for twenty-five cents, and to give, and they did give, universal free transfers thereon. The issue and sale of these tickets with universal free transfers was instituted April 1, 1912, and continued until August 20th, 1918, when said franchise was surrendered and cancelled by the plaintiff as hereinafter stated.

7. Under said Central Market Franchise ordinance, Exhibit No. 2, that company issued and sold eight tickets for twenty-five cents and gave universal free transfers, and continued to do this so long as it remained the owner of said franchise; and the plaintiff has continued the issuing and selling of eight tickets for twenty-five cents and giving such transfers ever since it became the owner of said franchise until August 20th, 1918, when said franchise was surrendered and cancelled by plaintiff as hereinafter stated.

8. The plaintiff in the operation of said system of street railway lines has developed and is conducting an extensive business in the carrying of street railway passengers in said city; and, during the year 1917, averaged 224,162 car rides per day, and during said year carried on its said lines in said city a total of 81,819,395 passengers, for which it received the sum of two and six tenths (2 6-10) cents per car ride and no more. A person riding upon a transfer is counted as a passenger in the above figures.

9. The plaintiff has now invested in said street railway lines and its equipment, on a conservative basis of investment and physical value, more than twelve millions of dollars. The plaintiff and its
6 predecessors in title have from time to time issued and sold, and there are now outstanding in the hands of bona fide holders for value, mortgage bonds in large amounts, of which the sum of $7,295,000, at least, are chargeable against its street railway property, the annual interest charge upon which is more than $333,000.

10. The plaintiff since it became the owner and operator of said system of street railway lines in the year 1914, has operated and managed, and is now operating and managing, said system efficiently, economically, conservatively, intelligently, safely and at the lowest possible cost consistent with adequate and sufficient service to the public. Notwithstanding such operation and management, the results have shown increased and increasing costs of operation and decreased and decreasing net revenue.

The cost of coal necessary to generate the power required to operate said street railway lines has shown a marked increase. The plaintiff paid for coal for this purpose, in the year 1915, the sum of

$60,164; in the year 1916, the sum of $81,354; and, in the year 1917, the sum of $234,838. The plaintiff has also been obliged to increase materially the wages paid to its employes. In the year 1916, it paid in wages to its railway employes the sum of $806,336, and, in 1917, the sum of $887,984.

The net earnings derived from the operation of said street railway lines for the twelve months ending June 30, 1918, after deducting operating expenses, taxes and a proper charge for depreciation, were $301,987, an amount insufficient by more than $31,000, to pay the interest on said $7,295,000, of bonds outstanding properly chargeable against plaintiff's street railway property, and barely
7 enough to pay two and one-half (2½) per cent upon the value of the property employed by plaintiff in furnishing street railway service to the people of Columbus.

11. During the month of June, 1918, street railway employes of plaintiff demanded a further increase in their wages. After some negotiations, the controversy was referred to the National War Labor Board for decision, and that Board, on July 31, 1918, rendered its decision, the result of which is that plaintiff must increase the wages of its street railway employes more than fifty per cent. This increase in the wage account will increase the operating expenses of the street railway lines of plaintiff about $560,000 per year. Plaintiff therefore says that as the result of its said operations for the current year ending June 30, 1919, its gross earnings therefrom will fall short of paying its operating expenses, depreciation and taxes by approximately $250,000., and that there will be no earnings whatever with which to pay its said interest charges or to yield any return to plaintiff upon the value of its property employed in furnishing street railway service to the people of the City of Columbus.

12. On the 20th day of August, 1918, plaintiff surrendered and cancelled both said Blanket Franchise and said Central Market Franchise by notification in writing addressed to the City of Columbus, Ohio, the Mayor, City Council and City Clerk of said City. A copy of this written notice is hereto attached marked "Exhibit No. 3" and referred to for greater certainty. Plaintiff asks that the facts set forth in such written notification be considered as part of
8 this bill of complaint with the same force and effect as if repeated in full herein.

13. The plaintiff charges that the rates of fare prescribed by the terms and conditions of said two franchises last above mentioned were not either before or when said franchise were surrendered and cancelled as hereinbefore stated, and would not be if longer enforced against the plaintiff, sufficient to enable it to maintain its street railway property in good order and repair and to perform its duty as a public utility; and that the enforcement of said rates of fare would violate the Fourteenth Amendment to the Constitution of the United States, in that said rates of fare are inadequate and confiscatory, and their enforcement would deprive the plaintiff of its property without due process of law. The plaintiff further charges, that by reason of the facts herein stated and by reason of the nature and character

of said two franchises, it was fully warranted and justified in surrendering and cancelling them.

14. The plaintiff further charges that the defendants threaten, and will, unless restrained and enjoined by this court, attempt, to force it to continue to operate its street railway lines under said Blanket Franchise and said Central Market Franchise upon all of the streets of said city, including those streets covered by the aforesaid perpetual franchises, and to force it to continue to issue and sell eight tickets for twenty-five cents and give universal free transfers; and that said threat of the defendants, if carried out, would compel the plaintiff to carry passengers upon its said lines at inadequate and confiscatory rates, in violation of said Fourteenth Amendment to the Constitution of the United States.

15. In anticipation of a controversy between said city on
9 the one side and the plaintiff on the other over the right of the plaintiff to surrender and cancel the aforesaid two franchises and its right to put into force and effect its new rates of fare, the details of which are set forth in Exhibit No. 3, of this bill of complaint, the plaintiff is giving and will continue to give to its passengers paying the new rates of fare appropriate rebate checks representing the difference between the new rates of fare and those prescribed by the aforesaid two ordinances, and it will redeem said rebate checks provided it shall be finally decided that the plaintiff was not justified in adopting said new rates of fare.

16. The plaintiff further says that the enforcement by the defendants or any of them of the aforesaid two franchise ordinances, or either of them, or an attempt by them to enforce the same, would cause the plaintiff immediate and irreparable injury, loss and damage; and that it has no adequate remedy at law in the premises.

17. The plaintiff further says that this bill of complaint presents a case within the jurisdiction of this court of equity in view of the controversies, confusion, risks and multiplicity of suits which would necessarily be occasioned by the resistance of the plaintiff to the enforcement of the inadequate and confiscatory rates of fare prescribed in the aforesaid two franchise ordinances, and that, in view of the public interests and the great number of people to be affected, thereby, only a court of equity is competent to meet such an emergency and to determine once and for all and without a multiplicity of suits matters that affect not only individual persons, but also the interests
of the entire community in the use of the public streets of
10 the City of Columbus and in the administration of the affairs of the plaintiff, a quasi-public corporation, operating lines of street railway in said streets.

Wherefore, the plaintiff prays:

First, That the defendants and each of them make full direct and true answer to the matters, all and singular, herein stated and complained of, but not under oath, this being hereby waived.

Second, That the defendants and each of them, their officers, servants, employes and agents, and their respective successors in office, be temporarily restrained and enjoined pending this suit, and on final hearing, be forever enjoined from in anyway forcing

or compelling the plaintiff or attempting to do so, to operate its lines of street railway, or any of them, in the City of Columbus, under said Blanket Franchise ordinance or under said Central Market Franchise ordinance; from in any way forcing or compelling the plaintiff, or attempting to do so, to charge and collect only the rates of fare prescribed by the aforesaid two franchise ordinances for carrying passengers upon its lines of street railway in said city; from in any way enforcing against the plaintiff, or attempting to do so, the aforesaid two franchise ordinances, or either of them, or any provision of either of them; from in any way interfering with the operation by the plaintiff of its lines of street railway on those streets in said city which are covered by the aforesaid perpetual franchises, said streets being the following, towit:

"On Main street, (formerly called Friend street) from High street to Rose avenue; on State street from High street to Grant avenue; thence in a northerly direction on Grant avenue to Oak street; thence on Oak street in an easterly direction to Sherman avenue, (formerly called Bruce street); on Long street from High street in an easterly direction to Mulberry street, and thence in a
11 southerly direction on Mulberry street from Long street to Broad street; on Cleveland avenue in a northerly direction from Long street to Mt. Vernon avenue; thence in an easterly direction on Mt. Vernon avenue to Washington avenue; on West Broad street from High street to a point opposite the center of the east driveway to the Central Hospital for the Insane, (the same being the corporation line of the City of Columbus as established by ordinance of the City of Columbus, passed on or about May 18th, 1890); on Glenwood avenue in a southerly direction from Broad street to the Harrisburg pike; thence in a southwesterly direction on the Harrisburg pike to Green Lawn cemetery;

and from in anyway interfering with the plaintiff in its possession, control, management or operation of its said street railway property, or attempting to do so.

Third. That the plaintiff may have all such other and further relief as to equity may seem meet and the nature of the case may require.

WILLIAM O. HENDERSON,
HENRY J. BOOTH,
HENDERSON & BURR, AND
BOOTH, KEATING, POMERENE & BOULGER,

*Solicitors for Plaintiff,*
*The Columbus Railway, Power and Light Company.*

JOSEPH S. CLARK,
HENRY A. McCARTHY,
*Of Counsel.*

STATE OF OHIO,
*Franklin County, ss:*

Samuel G. McMeen, being first duly sworn, deposes and says that he is the President of the above named plaintiff, The Columbus Railway, Power & Light Company, which is a corporation and is familiar with its business; that he has read the foregoing bill of complaint and knows the contents thereof; and that the facts stated and allegations contained in said bill of complaint are true.

SAMUEL G. McMEEN.

Sworn to before me and subscribed in my presence by the said Samuel G. McMeen this 20th day of August A. D. 1918.

SHERMAN B. RAMDALL. [SEAL.]
*Notary Public in and for Franklin County, Ohio.*

12 EXHIBIT No. 1.

An Ordinance, No. 17801.

Renewing to The Columbus Railway Company, for a term of twenty-five (25) years, its grants, rights, privileges and franchises, to maintain and operate its tracks and lines of street railroad upon the streets and avenues, and parts of streets and avenues, hereinafter mentioned, in the City of Columbus, Ohio, and prescribing the terms and conditions thereof, and repealing the provisions of any and all ordinances and resolutions, and parts of ordinances and resolutions, inconsistent with the terms of this ordinance.

(City Record Book 11, Page 524.)

Preamble.

Whereas, The Columbus Railway Company is the owner of and now engaged in operating certain lines of street railroad in the City of Columbus, Ohio, being the lines heretofore owned and operated by it, as well as those purchased from The Columbus Central Railway Company, and being the same lines enumerated in the title hereof; and

Whereas, Said several lines of street railroad owned by said The Columbus Railway Company, are held and operated by it under the authority of ordinances passed at various times, and for various terms, and containing various and inconsistent conditions as to the operation of lines of street railroad thereunder, and so limiting the franchises thereunder granted that they expire at different dates up to and including the year 1917; and

Whereas, In order to improve the service rendered by the said The Columbus Railway Company, it is desired that the several lines of street railroad now operated under separate and different franchise ordinances, may be operated by said company as one complete

and entire system, thereby better accommodating the public and facilitating the running of the cars of said company; and

13 Whereas, It is desired that the franchise rights of said The Columbus Railway Company to maintain and operate its tracks and lines of street railroad upon each and all of said several streets and avenues shall be made to expire at one and the same date; and

Whereas, It is desired that the burden to be borne by said The Columbus Railway Company in the way of payment of cost of street cleaning, sprinkling, paving and repairs upon the several streets and avenues occupied by its lines, shall be uniform; and

Whereas, The provisions of the existing ordinances under which the said The Columbus Railway Company claims the right to maintain and operate its lines of street railway upon the several street- and avenues, prescribe different and varying rates of fare, and it is desired that there shall be uniformity in, and a reduction of, the rates of fare, and a general system of transfers, applicable to each and every part of the system of street railroads owned and operated by said The Columbus Railway Company; and,

Whereas, A renewal of the grants, rights, privileges and franchises of said The Columbus Railway Company, on the streets and avenues herein and hereinafter named, for said term of twenty five years, upon the conditions hereinafter prescribed in this ordinance, will be conducive to the public interests; now therefore,

Be it Ordained by the City Council of the City of Columbus, Ohio, as follows, to-wit:

Routes.

14 Section 1. That the franchises, rights and privileges of The Columbus Railway Company to maintain and operate its tracks and lines of street railroad, with all necessary switches, connections, turn-outs and other appliances suitable and proper for its use, together with the franchise, right and privilege to operate street railroad cars thereon, on the following streets and avenues, and parts of streets and avenues, in the City of Columbus, Ohio, viz:

On High street from the south corporation line of the City of Columbus to its north corporation line, including the loop at Olentangy park; on Chittenden avenue in an easterly direction, from High street to The Cleveland, Cincinnati, Chicago and St. Louis Railway Company's tracks, and alongside said tracks in a southerly direction, forming what is known as the Fair Ground loop; on Goodale street in an easterly direction, from High street to Fourth street; on Chestnut street in an easterly direction from High street to Fourth street; thence on Fourth street in a northerly direction to Naghten street; thence on Naghten street in an easterly direction to Neil street; thence on Neil street in a northerly direction to Mt. Vernon avenue; thence on Mt. Vernon avenue in an easterly direction to Cleveland avenue; thence on Cleveland avenue in a northerly direction to Buckingham street; thence on Buckingham street in an easterly direction to Jefferson avenue; thence on Jefferson avenue

in a northerly direction to Leonard avenue; thence on Leonard avenue in an easterly and northeasterly direction to the north corporation line of the City of Columbus; on Mt. Vernon avenue in an easterly direction from Washington avenue to Taylor avenue; thence on Taylor avenue in a northerly direction to Atcheson street; thence on Atcheson street in an easterly direction for a distance of two hundred (200) feet; on Livingston avenue in an easterly direction, from High street to Kelton avenue, including the loop into the Driving park as now built; on Schiller street in an easterly direction, from High street to Parsons avenue; on West Goodale street in a westerly direction, from High street to Neil avenue; thence on Neil avenue in a northerly direction to Eleventh avenue; on Fourth street, from Livingston avenue, in a northerly direction to Wyandotte avenue; on Kelton avenue, from Main street, in a southerly direction to Livingston avenue; on Rose avenue, from Main street, in a northerly direction to Fair avenue; on Sandusky street, in a southerly direction from Broad street to Sullivant avenue; thence on Sullivant avenue, in a westerly direction, from Sandusky street to Glenwood avenue; on West Broad street, from a point opposite the center of the east driveway of the Central Hospital for the Insane (the same being the corporation line of the City of Columbus as established by an ordinance of the City of Columbus, passed on or about May 18th, 1890) to Hague avenue; on Main street in an easterly direction, from Rose avenue to Alum creek; on Oak street in an easterly direction, from Sherman avenue (formerly called Bruse street) to Fairwood avenue; on Cleveland avenue, from Buckingham street northerly to the north corporation — of said City of Columbus; on Neil street from Naghten street in a southerly direction to Spring street; thence on Spring street in a westerly direction to Front street; thence on Front street in a northerly direction to and over the Front street bridge across the railroad tracks; thence along Park street to Spruce street; thence westerly on Spruce street from Park street to Dennison avenue; thence on Dennison avenue southerly to Montgomery street; thence westerly on Montgomery street to Harrison avenue; thence on Harrison avenue, northerly, from Montgomery street to First avenue; thence on First avenue westerly, from Harrison avenue to Pennsylvania avenue; thence on Pennsylvania avenue in a northerly direction from First avenue to Fifth avenue; on Front street in a southerly direction, from Spring street to Fulton street; thence on Fulton street in an easterly direction to Parsons avenue; thence on Parsons avenue in a southerly direction to the south corporation line; on Town street from High street in a westerly direction to Front street; be and the same are hereby renewed to said The Columbus Railway Company, its successors and assigns, for and during the term of twenty-five years, from and after the passage of this ordinance; and the said The Columbus Railway Company is, and its successors and assigns are, hereby granted the franchise and right, and are hereby authorized and empowered to maintain and operate its lines of street railroad upon and over each and all of said streets and avenues, and parts of streets and avenues, aforesaid, for

said period of twenty-five years, from and after the passage of this ordinance, upon and subject to each and every of the terms, conditions, stipulations and requirements hereinafter prescribed, and subject to the requirements of the general ordinances of the City of Columbus, Ohio.

To Connect Tracks.

Sec. 2. The said The Columbus Railway Company shall connect its tracks on High street with the tracks of what was formerly known as The Columbus Central Railway, at the intersection of High street and Spring street, at the intersection of High street
17 and Town street, and at the intersection of High street and Fulton street, so that said lines may be operated as one system, in order to better accommodate the public; and said company shall have the right to connect, by suitable curves, tracks and appliances, its tracks at any point where they now intersect, or may hereafter intersect, at any time while this ordinance remains in force, under the direction and supervision, and according to plans and specifications to be approved by the Board of Public Works; and may maintain feed wire lines on any streets or avenues where they are now located, and elsewhere when needed, under like direction and supervision, and under plans to be approved by said board.

Provided, further, that said railroad company, in operating its lines of cars, shall make no change in the routes as now operated by it unless such change shall be first approved by resolution of the City Council of said city.

Street Repairs and Improvements.

Sec. 3. The said The Columbus Railway Company, shall keep in repair all that portion of said streets and avenues included within lines drawn one foot on the outside of the outer rails of its tracks; and shall pay for the cleaning, sweeping and sprinkling of said portion of the public way occupied by it and one foot on the outside of its outer rails, at the same rate and in the same manner required of abutting property owners for the residue of the public ways adjacent to said strip. If the City Council at any time orders the improvement of the roadway of any of said streets and avenues, by laying down thereon a pavement of any kind, said company shall, at its own expense, improve that portion occupied by its tracks and one foot on the outside thereof, with the same character of ma-
18 terials; or, if on the said streets or avenues a pavement has already been laid, and an assessment therefor placed on the tax duplicate, said company shall pay to the Director of Accounts of the City of Columbus, Ohio, such portion of the assessment for said improvement as the space occupied by said tracks and one foot on the outside of the outer rails bears to the entire width of the improved roadway; such sum to be by the Director of Accounts paid to the City Treasurer, and by him to be credited to any portion of the assessment made for the cost of such improvement, remaining

due from, and unpaid by, the several abutting property owners; provided, that if in any case the amount so paid shall exceed the unpaid assessments, the excess shall be by the Director of Accounts paid to the abutting property owner entitled thereto.

Pavements.

Sec. 4. The pavements provided for in this ordinance shall be laid at such height or grade as may be fixed or determined by the Board of Public Works, and shall, during the existence of this ordinance or grant, or any extension, amendment or renewal thereof, be kept in repair under the direction and supervision of such officers as may be from time to time vested by law or ordinance of the City Council with the control and supervision of the Public Highways and Works of said city; and on the failure of the company to make said repairs within thirty (30) days after receiving notice so to do from the City Council, the City Council may make the same or cause the same to be done, and said City of Columbus shall collect all the cost and expense thereof from said company, and the entire amount of such cost and expense shall constitute a lien and charge upon the property and franchise of said company the same as if formally levied and assessed as in the case of other municipal improvements. Whenever the said railroad is bring put down on any unimproved street or streets, said company shall grade the street or streets from curb to curb at its own expense on a level with its tracks.

Damage Indemnity.

Sec. 5. Said Railway Company shall, at all times hereafter, defend, indemnify and keep harmless the City of Columbus from any and all damages, lawful claims and demands for injuries to persons or property, the cost and expense of which said city may be subjected to or made liable for, by any proceedings at law or in equity, or otherwise, growing out of the grant of the privileges in this ordinance granted or out of the exercise or enjoyment of the same by said company, or out of the failure of said company to construct and keep in repair the pavement or other improvement by it herein required, or authorized, to be constructed and maintained; and said company may, at its own cost, defend against such actions, either in its own name or in the name of the City of Columbus.

Temporary Track Removals by City.

Sec. 6. The said City of Columbus shall have the right to temporarily remove or obstruct, or authorize the same to be done, any portion of the railroad tracks of said company, whenever and wherever it shall be necessary in laying down or repairing water pipes, gas pipes, sewers, drains, gutters or cisterns, or to use hose or any other apparatus necessary to be used in extinguishing fires, or any other public work or improvement required to be done

by said city, not disturbing the running of cars where it can be avoided, without incurring any liability for damage to said company.

Speed and Control of Cars.

Sec. 7. Said company shall at all times conform to such reasonable rules and regulations as are, or may hereafter be prescribed by ordinance, as to the rate of speed it may run its cars; and when its cars are about to start, and when in motion, if reasonable cause therefor exist, warning shall be given by gong or otherwise, to notify persons of immediate or approaching danger? No car shall be started or put in motion while any passenger is in the act of entering the same or alighting therefrom. Cars running in the same direction shall not approach nearer to each other than one hundred feet, unless from unavoidable necessity or on switches or turnouts. Gongs shall be sounded as a warning on all cars approaching each other from opposite directions, and on each car approaching street intersections, which the car is to pass from one street to another, where there are buildings to prevent persons on foot or persons in other vehicles on the street from seeing the approaching car; the warning last aforesaid to be given at a distance of not less then fifty feet from such street corner and from time to time until the car reaches such intersection.

21 Sewer and Water Pipes.

Sec. 8. The said City of Columbus shall not be liable in any way to said company for damages it may sustain from the breaking, or overflow of water from, any sewer or drain, or from the breaking of any water pipe or gas pipe by reason of any change in the grade of said streets; and said company shall so construct its tracks as to fully protect from damage thereby any and all sewers, water pipes and mains, gas or other pipes running beneath the surface of the streets.

Snow and Ice.

Sec. 9. In case it becomes necessary for said company to remove snow and ice from its tracks on said streets, it shall not be left in such manner as to interfere with or impede travel or render the street dangerous.

Conductors and Motormen—Exercise of Caution.

Sec. 10. The conductors in charge of cars shall not allow any lady or child to enter or leave any car while in motion; and the conductors and motormen shall keep a vigilant watch for all teams, carriages, persons and obstructions upon or near the track, and upon first appearance of danger, shall give warning and stop the car if necessary, to prevent accident; and the motormen must always be on the front platform while the car is in motion.

## Motive Power and Safe Equipment.

Sec. 11. Permission is hereby given said company to operate its entire lines of street railroad with any and all extensions that
22 may hereafter be made thereto, by electricity, or such other motive power, other than animal or steam power, as shall be acceptable to the city. Said company shall have the right to erect and maintain iron or wood poles, painted and neat in appearance, wires, fixtures and conduits, and any and all other appliances or appurtenances that in the opinion of the city shall be found necessary. At and after dark all cars running shall be lighted and provided with suitable signal lights. All cars shall be kept clean, and when the temperature is below 35 degrees Fahrenheit, shall be heated. No car shall be allowed to remain standing upon the line of any route for passengers or any other purpose so as to impede any other vehicle, but shall be subject to such police regulations as are or may be prescribed for any other vehicles so far as they may be applicable. No car or cars shall be used on such railroad if worn out, broken, or so constructed, or kept in such a condition as to imperil the lives, limbs or health of the passengers; provided, that if any time during the life of this grant or any extension thereof, said city shall require, by ordinance, all trolley wires or other electric wires in the principal business district of said city to be placed in conduits under ground, said company shall within a reasonable time after the passage of such ordinance, which time shall be fixed by said city, place all its trolley wires, and feed wires within said district, under ground.

## Wires and Poles.

Sec. 12. In the erection or placing of wires or conduits and in the use of any and all other appliances and appurtenances found necessary to operate said company's lines of railroad, a plan of the same, showing all poles, wires and other appliances or appurtenances
23 that said company shall, desire to use, shall be submitted to and approved by the Board of Public Works. Said city shall have the right to fix the height of all wires and poles above the street, and the size and location of all poles and conduits in the street, to determine the places in the streets where any and all tracks, appliances and appurtenances shall be located, and to establish such regulations with reference to the Public Safety and protection as the city shall from time to time deem necessary and proper.

## Interurban Lines.

Sec. 13. The said city hereby reserves the full right and power at any time during the life of the grant herein made to grant to any other company, corporation or individual, engaged in operating an interurban railroad to jointly use with said The Columbus Railway Company any track or part hereof owned or operated by said

The Columbus Railway Company, which may be necessary to enable the cars operated on such interurban railroad to pass by the most direct route to and from High street, if said cars shall enter said city west of High street, and to and from High street if said cars shall enter said city east of said High street, and to and from Chestnut street, if said cars shall enter said city north of Chestnut street and to and from Town street, if said cars shall enter said city south of Town street, upon equitable terms of payment therefor to said The Columbus Railway Company, taking into consideration the value, cost of construction and maintenance of
24 the track or tracks and over head construction so jointly used, the amount paid by said The Columbus Railway Company, its predecessors, successors and assigns, whether to said city or to abutting property owners, for street paving and the cost of maintaining the same upon such street or streets so occupied, the pro rata amount of taxes and assessments paid on such track or part thereof, and the cost of power used in operating such interurban cars. If such right to joint use be granted by said city and if terms of compensation therefor cannot be agreed upon by said The Columbus Railway Company and the corporation, company or individual applying for such joint use, within sixty days after such grant is made by said city, the terms of compensation therefor shall be submitted to arbitration, one arbitrator to be chosen by said The Columbus Railway Company, one by the corporation, company or individual applying for such joint use, these two to select a third arbitrator. The decision of said arbitrators, in the absence of fraud, accident or mistake of law or fact, shall be conclusive on both parties. But neither such arbitration nor any appeal therefrom shall in any way delay such joint use and occupation, when so granted as aforesaid, provided such grantee of the right to such joint use shall first secure to the satisfaction and acceptance of said The Columbus Railway Company the payment of the compensation which may be awarded by said arbitrators. No interurban cars shall be operated over any track or tracks, or parts thereof of said The Columbus Railway Company under and by virtue of the foregoing provision of this ordinance authorizing said city to compel such joint use, more frequently than one car each way every thirty minutes. Said The Columbus Railway Company is hereby authorized and empowered to make and carry out contracts or traffic arrangements, for
25 the use of any of its tracks or any part thereof, by interurban cars of a guage different from that of its own cars, and, with the consent of said city to permit the laying and the use of a third rail for said purpose; but it shall not permit such joint use or the laying of such third rail except over such route as may be necessary to enable such interurban cars to reach, and return from, the tracks now known as the interurban loop as now existing or hereafter modified. It is intended and understood that the phrases "interurban cars" and "cars operated on such interurban railroads" refer to and mean only such cars as shall be operated at regular intervals between said City of Columbus and some other city, or some village, at least ten miles distant from the limits of said City of Columbus, where such interurban cars enter the same. Any grant or traffic

arrangement made by said The Columbus Railroad Company to any other corporation, company or individual, to use any o. its tracks or any part thereof, shall be subject to all rules and regulations of said city now in force, and all reasonable rules and regulations which may hereafter be adopted by said city, concerning the rate of speed and headway, and the operation, character, lighting and heating of all cars so operated under such grant or traffic arrangement for such joint use, and for the comfort and safety of passengers carried thereon.

Interurban Passenger and Freight Cars.

Sec. 14. Neither said The Columbus Railway Company nor any other person, company or corporation which may hereafter obtain the right to use any of its track or tracks, shall move along
26 or over the same any passenger cars in trains of more than three cars per train, including the motor car.

Freight cars shall not be moved along or over the whole or any part of the tracks of the said The Columbus Railway Company in said city, except upon the streets and avenues or parts of streets and avenues hereafter designated by ordinances which may hereafter be passed by the City Council of said city granting such permission: provided, however, that said company may transport over any of its lines, material to be used by it in construction of repairs and extensions.

Conductors and Motormen—Duties.

Sec. 15. At all times when any car is in use a motorman in charge of such car shall be stationed on the front platform of the motor car; and there shall be a conductor on each car, whose duty it shall be to collect fares and to look out for the safety and comfort of passengers.

Electrolysis.

Sec. 16. In the construction of its trolley wires, said company shall safeguard the water pipes, and any other system of iron pipes which may be maintained by said city, by using what is known as the "double trolley system," or such other device, to be approved by the Board of Public Works, as shall effectually protect such pipes from injury by electrolysis.

To Expend a Million Dollars.

Sec. 17. Said company shall, as rapidly as the requirements of its railroad system and the efficient service of the public de-
27 mands, during the life of this grant, expend*ed* not less than $1,000,000.00 in extensions and betterments, and shall, at all times during the life of this franchise, furnish, upon all its lines, efficient and adequate service and a sufficient number of first class, commodious cars for the accommodation of its patrons. The City

Council of said city may, by ordinance, require such reasonable extensions of such of the lines operated by said company as may be necessary for the efficient operation of such railroad and for the convenience of the public, whenever along the line of any such proposed extension and between parallel lines four hundred feet distant on each side thereof, there shall be when such extension is ordered, not less than one hundred and fifty separate buildings, used and occupied as dwellings, per mile or in like proportion for any less distance; but said company shall not be required to construct more than one mile of extensions within one calendar year.

It is expressly provided that any and all franchise rights to operate extensions which may hereafter be granted to said company, shall expire at the expiration of said period of twenty-five years.

Grooved Rails and Kind of Pavement.

Sec. 18. In making extensions on paved streets, and in relaying tracks on paved streets, grooved or other modern and improved rails of weight and pattern to be approved by the Board of Public Works of said city shall be laid; such rails shall be laid upon foundations of concrete or other material, and according to plans to be approved by said board.

28 Whenever any unpaved street, or any part of any street, along which said company operates lines of street railroad, shall hereafter be improved by laying down thereon a pavement, said company shall relay its tracks thereon in the manner aforesaid, and shall pave the portion of such street as provided in sections 4 and 5 of this ordinance.

Cash Deposits for City Repairs.

Sec. 19. Said company shall keep on deposit with the said city at all times the sum of one t-ou*n*sand dollars as an emergency fund, against which the city may draw, upon vouchers drawn by the Director of Accounts, with the approval of the Board of Public Works, for the cost and expense of any repairs made by said city, which, by the terms of this ordinance, should have been made by said company, and which said company after due notice and reasonable opportunity has failed or neglected to make within the time prescribed by this ordinance; and said company shall at once replace any portion of said fund, expended as aforesaid so as to keep on deposit at all times the amount of one thousand dollars; and at the expiration of the time granted by this ordinance any sum remaining in said fund due to said company shall be refunded.

Perpetual Franchises.

Sec. 20. The grants and provisions hereinbefore made and contained for thr renewal of the franchise of the said The Columbus Railway Company on the streets and avenues hereinbefore mentioned in section 1 of this ordinance, shall in all respects apply to the grants,

rights, privileges and franchises of the predecessors in title of said The Columbus Railway Company, to construct, maintain
29 and operate lines of street railway on Main Street, (formerly called Friend Street) from High street to Rose avenue; on State street from High street to Grant avenue; thence in a northerly direction on Grant avenue to Oak street; thence on Oak street in an easterly direction to Sherman avenue, (formerly called Bruce street); on Long street from High street in an easterly direction to Mulberry street, and thence in a southerly direction on Mulberry street from Long street to Broad street; on Cleveland avenue in a northerly direction from Long street to Mt. Vernon avenue; thence in an easterly direction on Mt. Vernon avenue to Washington avenue; on West Broad street from High street to a point opposite the center of the east driveway to the Central Hospital for the Insane, (the same being the corporation line of the City of Columbus as established by ordinance of the City of Columbus, passed on or about May 18th, 1890); on Glenwood avenue in a southerly direction from Broad street to the Harrisburg pike; thence in a southwesterly direction on the Harrisburg pike to Green Lawn cemetery; as fully as if the routes and streets and avenues mentioned in this section were specifically mentioned and included in the first section of this ordinance, if, and so far as, the franchises in the streets and avenues mentioned, in this section or either of them or any part thereof shall hereafter be judicially declared by a court of competent jurisdiction, or by any appellate court to which any suit brought to test any or all of said franchises shall be brought, may be carried by proceedings in error or on appeal, not to be franchises in perpetuity.

It is expressly provided that nothing contained in this
30 ordinance is intended, nor shall anything herein be construed to be, a concession by said City of Columbus of the validity of any claim of said company to perpetual franchises to operate lines of street railroad in all or any of the streets and parts of streets named in this section.

It is further expressly provided, that nothing contained in this ordinance shall be pleaded or considered to be a bar to any suit or suits which may hereafter be brought in any court or courts of competent jurisdiction, seeking to test the validity of any claim or claims to said company to perpetual franchises to operate any line or lines of street railroad upon any of the streets or parts of streets mentioned in this section.

## Fares and Transfers.

Sec. 21. Said The Columbus Railway Company, its successors and assigns, shall be entitled to charge fares within the corporate limits of said city during the term herein provided at the following rates, and no more, to-wit: For a single cash fare, 5 cents; for tickets in packages of seven twenty-five cents, until the annual gross receipts from all fares received on all lines operated by said company within said city amount in the aggregate to the sum of one million seven hundred and fifty thousand dollars ($1,750,000.00) and after said

annual receipts amount to said sum, for tickets in packages of eight, twenty-five cents, all of which tickets shall be good for use from the time the regular cars start in the morning until the regular cars quit running at or shortly after midnight; for single fares between the hours when regular cars quit running at or shortly after
31 midnight until such cars commence running in the morning, during the first five years of the term granted by this ordinance, ten (10) cents, and thereafter five (5) cents.

No charge shall be made for children under six years of age attended by parent or other person. Children over six years of age and under ten years of age shall be carried for 3 cents each.

Tickets for the rates required by this ordinance shall be kept on sale and sold at the principal office of said company in the City of Columbus during business hours and at all times by conductors on the regular cars of said company at the rates for tickets aforesaid. For each cash fare and for each ticket said company shall, on demand of the passenger tendering the same, issue to such passenger a transfer slip good for one continuous passage in said city on any other line of street railroad owned or operated by said company which connects with, diverges from, or crosses, the line on which said transfer was issued, if presented within fifteen minutes after the time designated by punch marks on transfer slip, which time so designated shall be a reasonable arriving time of car at any one of the transfer points of the line by which such transfer was issued.

For each five cent cash fare said company shall, on demand of the passenger tendering the same, issue to such passenger a transfer slip good for one continuous passage over any other line of electric railway now constructed or hereafter constructed or operated in said city by any person, company or corporation, other than The Columbus Railway Company, whose charge for transfer slips is not less than that of said The Columbus Railway Company, and whose line of railroad connects with, diverges from, or crosses any line
32 of road of said The Columbus Railway Company; provided, that the company, corporation or person operating such other line as aforesaid shall be required by said city to accept said transfer slips for such passage, and to exchange transfers with said The Columbus Railway Company; and said The Columbus Railway Company shall be required to accept, from all passengers transferred from such lines of other roads, similar transfer slips good for continuous passage over its lines in said city, if presented in the time above provided; and the receipts from the passengers purchasing such transfer slips, so issued as aforesaid by said The Columbus Railway Company, and by any other person, company or corporation, operating lines which cross the same or connect therewith, shall be equally divided between the operators of said lines of railroad respectively.

No free transportation shall be furnished except to officers and employes of the said railroad company, and, when permitted by law, to policemen and firemen of said city wearing their official uniform.

## All Night Cars.

Sec. 22. Between the hours of 5:30 a. m. and 12 o'clock midnight cars shall be run at intervals not to exceed the following, viz: High street, between north and south corporation lines, 10 minutes; Schiller street and High street, to north corporation line, 10 minutes; Long street, 6 minutes; Main and Neil avenue, 6 minutes; State and Oak streets, 7 minutes; Livingston avenue and Fourth street, 10 minutes; Leonard avenue and Camp Chase, 11 minutes; Mt. Vernon avenue and cemetery, 11 minutes; Central market line, 15 minutes; Pennsylvania and Parsons avenue, 10 minutes. Be-
33 tween the hours of 12 o'clock midnight and 5:30 o'clock a. m., cars shall be run, starting at 1 o'clock a. m., and continuing until 5 o'clock a. m., hourly upon high street, West Broad street, and on two lines to be hereafter designated by said city, running easterly from High street.

## Expiration.

Sec. 23. Upon the expiration of the term of the renewal franchise herein granted said company shall, unless a further renewal be granted by said city, remove all its tracks, wires and other appliances from the streets and avenues of said city and leave the portion of each and every street occupied by its lines in good condition, corresponding in finish and material with the remainder of such streets and avenues.

Sec. 24. The terms "the city" and "said city" whenever used in this ordinance, unless the context clearly indicates a different intention, are intended and shall be construed to mean The City of Columbus, Ohio; and the terms "the company" and "said company" and "The Columbus Railway Company" whenever used in this ordinance, unless the context clearly indicates a different intention, are intended and shall be construed to mean The Columbus Railway Company, its successors and assigns.

Sec. 25. If at any time in the future the laws of Ohio shall be so amended as to do away with the Board of Public Works as now constituted by law, then and in that event the powers and duties herein conferred upon and required of the Board of Public Works shall be performed by such city officer or board as shall, by law, be entrusted with the *the* duties and powers now performed by such board.
34 If in the future the laws shall be so amended as to do away with the Director of Accounts of said city as now constituted by law, then the powers and duties conferred upon the Director of Accounts under this ordinance shall be exercised by such officer of the city as shall by law succeed to his powers and duties.

## Repeal and When in Effect.

Sec. 26. The provisions of any and all ordinances and resolutions, and parts of ordinances and resolutions, heretofore passed or

adopted by the City Council of said city, which are inconsistent with the terms of this ordinance, are hereby repealed and rescinded.

Sec. 27. This ordinance shall take effect and be in force from and after its passage and legal publication, and the filing by said The Columbus Railway Company, with the City Clerk of said city, of its acceptance in writing of each and all of the terms, provisions and requirements of this ordinance; provided, however, that if said company shall fail to file such written acceptance within thirty days after the passage of this ordinance, then this ordinance shall be void and of no force and effect, but if said company shall be prevented from accepting the terms, provisions and requirements of this ordinance by injunction or other judicial or legal process, or if its acceptance thereof shall be delayed or postponed in the manner or by the means aforesaid, said Company may accept the terms, provisions and requirements of said ordinance at any time within thirty days after the expiration of the period during which said acceptance
35 shall have been prevented or delayed as aforesaid, in which event said acceptance shall have the same effect as if the same had been filed within thirty days after the passage of this ordinance.

Passed, February 4, 1901.

JAMES J. THOMAS,
*President of the City Council.*

Approved by the Mayor, February 6, 1901.

Attest:
JOHN T. BARR,
*City Clerk.*

36 EXHIBIT No. 2.

An Ordinance, No. 17802.

Granting Permission to The Central Market Street Railway Company, Its Successors and Assigns, to Construct, Operate and Maintain a Single or Double Track Street Railway, with Necessary Sidetracks, Curves, Turn-outs and Switches in the following Streets of the City of Columbus, Ohio, towit: Rich Street, Fifth Street, Donaldson Street, Livingston Avenue, Mohawk Street, Reinhard Avenue, Jaeger Street, Hanford Street, Fourth Street, Hosack Street, Innis Avenue and Parsons Avenue to the South Corporation Line of said City of Columbus.

(City Record Book 11, Page 516.)

Whereas, Application has been made in writing to the Board of Public Works, and the City Council of the City of Columbus, Ohio, for a franchise to construct, operate and maintain a street railway upon Rich street, Fifth street, Donaldson street, Livingston avenue, Mohawk street, Reinhard avenue, Jaeger street, Hanford street, Fourth street, Hosack street, Innis Avenue and Parsons avenue, to the south corporation line of the said city; and

Whereas, Notice of said application has been published according to law; and

Whereas, Bids have been advertized for and received by said city for the construction of a railroad upon said streets as required by law; and

Whereas, The Central Market Street Railway Company bid and agreed to carry passengers upon said proposed railroad along said route at a lower rate of fare than any other bidder; and

Whereas, The consent in writing of the owners of the majority of the feet front of the lots and lands fronting and abutting upon said parts of said streets has been obtained and filed with the Clerk
37 of said city for the construction, operation and maintenance of said street railroad. Now therefore,

Be it ordained by the City Council of the City of Columbus, Ohio, as follows, towit:

Section 1. That The Central Market Street Railway Company, its successors and assigns, be and is hereby granted permission and authorized to construct, operate and maintain a street railway in and upon the following streets in the city of Columbus, Ohio, towit: In Rich street from Third street to Fifth street; in Fifth Street from Rich street to Donaldson street; in and across Donaldson street and Livingston avenue to Mohawk street; in Mohawk street from Donaldson street and Livingston avenue to Reinhard avenue; in Reinhard avenue from Mohawk street to Jaeger street; in Jaeger street from Reinhard avenue to Hanford street; in Hanford street from Jaeger street to Fourth street; from Hanford street to the south corporation line of said city; in Hosack street from Fourth street to Parsons avenue; in Innis avenue from Fourth street to Parsons avenue; in Parsons avenue from Innis avenue to the south corporation line of said city in accordance with the provisions of this ordinance; with permission to connect the track or tracks on said streets with each other, and with the track or tracks of The Columbus, London and Springfield Railway Company, and The Columbus, Buckeye Lake and Newark Traction Company at Rich and Third streets, by means of a curve or curves.

Sec. 2. Said grantee and assigns shall have the right to lay down a single or double track on the route described in section 1 of this ordinance, with switches and turn-outs, wherever switches and turn-outs may be necessary or convenient, and to connect said track or tracks by curve or curves with its other track or tracks, and with the tracks of the other intersecting standard gauge street rail-
38 roads within the city limits of Columbus, Ohio.

A plan showing the location of such switches, tracks and turn-outs shall be submitted to the Board of Public Works of said city and approved by it, before the construction thereof.

Sec. 3. That said track shall be of a standard gauge of four feet and eight and one half inches in width, and on paved streets the rails shall be standard patterns, grooved rails, not less than 70 pounds to the yard, to be approved by the Board of Public Works, and upon such foundation as said Board shall direct. The space between the

inner rails where the double tracks are laid shall not exceed five feet, measured from rail to rail.

Sec. 4. Said grantee, its successors and assigns, shall keep in repair all that portion of said streets and avenues which is included within lines drawn one (1) foot outside of the outer rails of its said tracks; and shall pay for the cleaning, sweeping and sprinkling of said portion of the public way occupied by it, and one foot on the outside of its outer rails, at the rate and in the same manner required of the abutting property owners for the residue of the public ways adjacent to the said strip. If the City Council at any time orders the improvement of the roadway of any of said streets, avenues or alleys by laying down thereon a pavement of any kind, or a macadam roadway, said company, shall, at its own expense, improve that portion occupied by the tracks of said road and one foot outside thereof with the same character of material as is used on the remainder of the street, and shall relay its or their tracks on any street or streets so paved with grooved rails on foundations as specified in section 3 hereof; or if on any of the said streets or avenues a pavement has already been laid, and an assessment therefor placed on the tax duplicate, said company shall pay to the Director of Accounts of the city
39 of Columbus, Ohio, a proportion of the present value of the pavement covered by the assessment for said improvement as the space occupied by said tracks and one foot on the outside of the outer rails thereof bears to the entire width of the improved roadway. Such sum to be by the Director of Accounts paid to the City Treasurer, and by him to be credited to any portion of the assessment made for the cost of such improvement, remaining due from, and unpaid by, the several abutting property owners. Provided, that if in any case the amount so paid shall exceed the unpaid assessments, the excess shall be by the Director of Accounts paid to the abutting property owner entitled thereto. The present value of the street paving referred to in this section to be determined by the Board of Public Works in consultation with the officers of said railway company, and in case a satisfactory price cannot be agreed upon the matter is to be settled by arbitration according to the provisions of the Revised Statutes of Ohio.

Sec. 5. The pavement provided for in this ordinance shall be laid at such height of grade as may be fixed or determined by the Board of Public Works, and shall, during the existence of this ordinance, or grant, or any extension, amendment, or renewal thereof, be kept in repair under the direction, or under the supervision and direction of such officers as may be from time to time vested by law, or ordinance of the City Council, with the control and supervision of the public highways and works of the city, and on the failure of the company to make said repairs within thirty (30) days after receiving notice so to do from the Board of Public Works, the said board may make the same, or cause the same to be done, and the said City of Columbus shall collect all the cost and expense thereof from said company and the entire amount of such cost and expense shall constitute a lien and charge upon the property and franchise of said company, the same as if formally levied and assessed as in

the case of other municipal improvements. That whenever
40 the said railway is being put down on any improved street or streets said grantee and assigns shall grade the street from curb to curb at its own expense, and on a level with its tracks.

Sec. 6. Said grantee and its assigns shall at all times hereafter defend, keep harmless and indemnify the city of Columbus from any and all damages, lawful claims, and demands for injuries to persons or property, cost and expenses to which said city may be subjected or made liable by any proceeding at law or in equity growing out of the grant of the privileges in this ordinance granted, or out of the exercise or enjoyment of the same by said grantee and its assigns, or out of the failure of said grantee and assigns, to construct or keep in repair the pavement or other improvements by them herein required to be constructed and maintained; and said grantee or its assigns may, at its own cost, defend against such action, either in its own name or in the name of the City of Columbus.

Sec. 7. The said city of Columbus shall have the right to remove or obstruct, or authorize the same to be done, any portion of said railroad track wherever it shall be necessary in laying down or repairing water pipes, gas pipes, sewers, drains, gutters or cisterns or by hose or any other apparatus necessary to be used in extinguishing fire, or any other public work or improvement required to be done by said city, not disturbing the running of cars where it can be avoided, without incurring any liability for damage to said grantee.

Sec. 8. The said city of Columbus shall not be liable in any way to said grantee or its assigns, for damages it may sustain from the breaking or overflow of water from any sewer or drain, or from the breaking of any water pipe or gas pipe, or by reason of any change in the grade of said streets, and said grantee and assigns shall so construct the track as to fully protect from damage thereby any and all sewers, water pipes and mains, gas or other pipes running beneath
11 the surface of the streets. Whenever the surface drainage of any street (whether improved or unimproved) be obstructed by the laying of said track the said grantee or its assigns shall construct all catch basins and pipe lead-offs, or relay so much of the paved roadway of said street at its or their expense, as in the opinion of the said Board of Public Works may be necessary to overcome the effects of such obstruction.

Sec. 9. In case it becomes necessary for said grantee and its assigns to remove the snow and ice from the tracks on said streets, it shall not be left in such a manner as to interfere with or impede travel or render the streets dangerous.

Sec. 10. The conductors, drivers or motormen of cars shall not allow any woman or child to enter or leave any car while in motion, and shall keep vigilant watch for all teams, carriages, persons and obstructions upon or near the track, and upon the first appearance of danger thereto, shall give warning and stop the car, if necessary, to prevent accident, and either the driver, conductor or motorman must always be on the front platform while the car is in motion.

Sec. 11. No car shall be run at a greater rate of speed than twelve miles an hour. Cars driven in the same direction shall not approach

nearer to each other than one hundred feet, unless from unavoidable necessity, or on switches or turn-outs. Said grantee and assigns shall at all times conform to such general rules and regulations as may from time to time be made by the council as to the rate of speed it may run its cars, and while the cars of said grantee and assigns are in motion or about to start, warning shall be given by bell or otherwise, to notify persons of any immediate or approaching danger.

Sec. 12. Permission is hereby given said grantee and its assigns to operate its entire line of street railway with any and all extensions that may hereafter be made thereto, by electricity or other
42 motive power, other than animal or steam power, as shall be acceptable to the city for such purposes. Said grantee and its assigns shall have the right to erect and maintain iron or wood poles, painted and neat in appearance, wires, fixtures and conduits, and any and all other appliances or appurtenances that in the opinion of said city shall be found necessary. At and after dark, all cars running shall be lighted and provided with suitable signal lights, and cars shall be kept clean, and when the temperature is below 35 degrees Fahrenheit, shall be heated. No car shall be allowed to remain standing upon the line of said route for passengers or any other purpose, so as to impede any other vehicle, but shall be subject to such police regulations as are, or may be, prescribed for other vehicles, so far as they may be applicable. No car or cars shall be used on such railroad if so worn, broken or constructed, or kept in such condition as to imperil the lives, limbs or health of the passengers; provided, that if at any time during the life of this grant or any extension thereof said city shall require by ordinance all trolley wires or other electric wires in the principal business district of said city to be placed in conduits under ground, said grantee and its assigns shall within a reasonable time after the passage of such ordinance, and which time shall be fixed by said city, place all its trolley and feed wires within said district under ground. In the construction of its system of trolley wires said company and its assigns shall guard against injury to the water and other pipes of said city from electrolysis by the use of what is known as the "double trolley system" or such other device as may be approved by the Board of Public Works for that purpose.

Sec. 13. In the erection and placing of wires or conduits and in the use of any and all other appliances or appurtenances found necessary to operate its line, a plan of the same, showing all poles,
43 wires and other appliances or appurtenances that said grantee and its assigns shall desire to use, shall be submitted to and approved by the Board of Public Works. Said city shall have the right to fix the height of all wires and poles above the street, the size and location of all conduits in the street, and the distance at which poles shall be apart, and to regulate the places within the street where any and all tracks, appliances and appurtenances shall be located and to establish such regulations with reference to public safety and protection as the said city shall from time to time deem necessary and proper.

Sec. 14. Cars shall be run by said grantee, and its assigns, at no longer intervals than fifteen minutes, unless prevented by unavoid-

able casualty, and shall be operated regularly between 8 a. m. and 10 p. m. on Sundays, and between 5:30 a. m. and 11:30 p. m. on all other days; and said grantee and its assigns shall not run a train of more than three cars, including the motor, on any of its lines in said city.

Sec. 15. The Central Market Street Railway Company, and its assigns, shall be entitled to charge fares as follows, and no more: For single fare within the corporate limits of said city, five cents; for seven tickets, twenty-five cents. No charge to be made for children under six years of age, attended by parents or other persons in charge of them. Children over six and under twelve years of age shall pay three cent fares. For each five cent fare said company and its assigns, shall on demand, at the time of payment of said fare, issue a transfer slip good for continuous passage within said city, over any line of railway connecting with or intersecting its line of railway, now or hereafter built, if presented within twenty minutes after leaving the car of the issuing company, providing said transferee line be required by said city to accept such transfer slip for such passage. And the said The Central Market Street Railway Company, and
44 its assigns, shall be required to accept from any such connecting or intersecting line, similar transfer slips, which shall be good for immediate continuous passage over its line within said city of Columbus. The fares paid, for which such transfers are issued, shall be divided equally between the operators of the two connecting or intersecting lines of railways over which said fares are paid.

Sec. 16. Said grantee and its assigns, shall have the right to carry passengers, United States mail, packages, express matter, baggage and freight, on its said lines in said city of Columbus, but shall not have the right to move along its lines within the business district of said city any steam railroad freight or passenger cars, and all cars of said company and its assigns carrying packages, express matter, baggage and freight, shall be loaded and unloaded in a depot or a place to be hereafter designated by said company and its assigns on lands abutting on its said line, and shall have the right and permission to put in proper curves, switches and tracks on said streets and avenues from its said lines to its said depot across the sidewalk in front thereof to said depot at any point along its said line in said city of Columbus. Said company or its assigns may select for its use in loading, unloading and storing all kinds of freight and its cars, except live stock, and shall have the like right and permission to put in proper curves, switches and tracks on said streets and avenues from its said lines to said depot across the sidewalk in front thereof, at any point along its said lines in the said city of Columbus.

Sec. 17. Said The Central Market Street Railway Company or its assigns, shall have the right to connect its lines with the standard gauge loop in the central portion of said city, and shall have the right and permission to use and occupy said loop under the
45 terms and conditions contained in section 15 of ordinance No. 16,676, passed by the council of the city of Columbus, on the 23rd day of April, 1900, except that said company and its assigns shall only be required to run its said passenger cars over said loop, as

required by this ordinance over its other lines within said city, and all the lines of said company and its assigns in said city shall be subject to all provisions contained in said section fifteen (15) of said ordinance No. 16,676 aforesaid.

Sec. 18. As a consideration for the grants herein made the said The Central Market Street Railway Company and its assigns shall pay to the city of Columbus the following per cent upon the gross receipts of said company for local passengers fares receiver within said city of Columbus, towit: two per cent of said fares, during the term of said franchise, provided that by "local fares" is meant only those fares for passengers transported entirely within the limits of said city and does not include any part of fares for passengers carried partly within and partly without said limits. Said payments shall be made annually at the beginning of each calendar year for the amounts earned during the preceding year, accompanied by a statement of the gross receipts during said period from local fares, duly verified by the proper officer of said company and filed with the Director of Accounts.

The director of Accounts of said city, within 30 days immediately following the time of said payment, shall have access during business hours, to the books of said grantee or assigns for the sole purpose of ascertaining the amount of local fares received by said grantee or its assigns for carrying said passengers within said city limits during such preceding year. Provided, however, that if at the beginning of any calendar year the said The Central Market Street Railway Company, and its assigns, shall notify said city of
46 Columbus that it will, and shall thereafter sell tickets for one passage upon its road in Columbus, Ohio, at the rate of eight tickets for 25 cts. and 33 tickets for one dollar, then said railway company shall be relieved from the further annual payments to said city under this section so long as it shall continue to sell tickets at such reduced rates.

Sec. 19. This grant is made and shall continue in force for the full period of twenty-five (25) years from and after the 23rd day of April, 1900, and all franchises and grants to said grantee and its assigns for extensions of lines, turn-outs, switches, connections or additional lines of street railway connected with, or to be connected with the lines of street railway of said grantee and its assigns, authorized and permitted under this ordinance, shall be considered a part of the system of street railway hereby authorized, and shall expire and wholly terminate with the expiration of the franchise and grant authorized under the terms of this ordinance.

Sec. 20. This grant is made upon the condition that said railroad shall be constructed and ready for operation within said city of Columbus within two years from the passage of this ordinance, and if not constructed and in operation within said time the grant herein and all rights thereunder shall thereupon and without any action on the part of said city, cease and determine. Provided that if said grantee and its assigns be delayed in the construction by injunction or other proceedings in court over which it has no control, the time it is so delayed by such proceedings shall not be counted as a part of the period within which said railway is to be constructed and made

ready for operation, but said period for such construction and putting in readiness for operation shall be extended by adding to the period of two years aforesaid the length of time said company is so delayed by said causes.

Sec. 21. Upon the expiration of the term of twenty five
47 (25) years, provided by this ordinance, unless such grant has been renewed or extended by said city, the city of Columbus shall have the right by giving two years' notice in writing, before the expiration of said term of twenty five years, of its intention so to do, to purchase of the said grantee and its assigns so much of its lines of railway as then lies within the city at a purchase price to be fixed by three disinterested men, one of whom shall be selected by the city, one by said grantee or its assigns, and the third by the two so chosen; provided, that if said city shall not elect to purchase said portion of said railway or shall not renew or extend said grant, then said grantee and its assigns shall within eight months from the expiration of said time remove the tracks, wires, poles and conduits and other properties from the streets so occupied by it, and shall leave the portions of the streets so occupied by them in good condition and repair. And if the said city elects to make said purchase the price fixed therefor shall be paid the said grantee or its assigns in cash before taking possession of said part of said railway, and within sixty days after said price is so fixed by said arbitrators; and in default of such payment within said time said option to cease and determine.

Sec. 22. The said city hereby reserves the full right and power to grant to any other company, corporation or individual, the right to jointly use all or any part or parts of said tracks with said The Central Market Street Railway Company and its assigns, and with each other upon equitable terms of payment to said The Central Market Street Railway Company, and its assigns, taking into consideration the value, cost of construction, amounts paid and repaid for street paving and other street improvements and the maintenance of the tracks so used and of the power used for operation. In the
48 event said terms cannot be agreed upon by said owning, succeeding or assignee company, and the party applying for said joint use within sixty days after application therefor following a grant for such joint use by said city, said terms shall be submitted to arbitration, one arbitrator to be chosen by said owner, successor or assignee, one by the party desiring to jointly use said tracks, and these two so selected to select the third arbitrator. The decision of said arbitrators in the absence of fraud, accident or mistake of law or fact, to be final and conclusive on both parties. But said city of Columbus reserves the right to fix and determine by ordinance the rules and regulations governing such joint use and occupation. Provided, that neither the arbitration herein mentioned nor any appeal therefrom, shall in any manner delay the joint use and occupation by any person, firm or corporation, which shall receive a grant thereof as aforesaid, with The Central Market Street Railway Company, under such rules and regulations as shall have been fixed by said city as aforesaid. Provided further, that said The Central Market Street Railway Company and its assigns, shall not have the

right to grant to any other company, corporation or individual, permission to use any portion of its said tracks within said city without such permission having first been given by said city.

Sec. 23. The said city also reserves the right to grant to any other company, corporation or individual, permission to lay, on that part of Parsons avenue covered by this grant, at its or their own expense, any additional rail or rails, to be used by such company, corporation or individual in connection with the rail or rails, ties and roadbed of The Central Market Street Railway Company; the use thereof and the compensation to be paid to said The Central Market Street Railway Company and its assigns, for such use to be arrived at and determined by arbitration in the manner and with like effect as
49 provided by section 22 of this ordinance. Provided that the laying of such additional rail or rails shall be under the supervision and subject to the approval of the Board of Public Works of said city.

Sec. 24. The terms "The Central Market Street Railway Company," "said company," "the Grantee," and "the Company," wherever used in this ordinance, unless the connection clearly indicates a different intention, is intended, and shall be construed, to mean "The Central Market Street Railway Company and its assigns."

Wherever in this ordinance the term "the City of Columbus," "the city," or "said City" is used, said terms, unless the connection clearly indicates a different intention, is intended, and shall be construed, to mean "the city of Columbus, Ohio."

Sec. 25. This ordinance shall take effect and be in force from and after its passage and legal publication, and the filing with the City Clerk of said city by said company of a written acceptance of its terms and conditions, and the payment of said company of the cost of publication of this ordinance.

Passed January 21, 1901. JAMES J. THOMAS,
*President of the City Council.*

Approved by the Mayor, January 22, 1901.
Attest:
JOHN T. BARR,
*City Clerk.*

50 EXHIBIT No. 3.

Columbus, Ohio, August 20, 1918.

To the City of Columbus, Ohio, George J. Karb, Mayor of Said City, James J. Thomas, City Clerk of Said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Arthur P. Lamneck, Joseph C. Nailor, Edgar L. Weinland, and Fred P. Zimpfer, Members of the City Council of Said City, City Hall, Columbus, Ohio:

The Columbus Railway Power and Light Company, hereinafter referred to as This Company, has for sometime past been operating

its street railway lines in the city of Columbus under two certain franchises granted by said city, the first to The Columbus Railway Company for a term of twenty five years by ordinance approved February 6, 1901, sometimes called and hereinafter referred to as the Blanket Franchise, duly transferred and conveyed by that company to this company by deed dated January 29, 1914, and the second to The Central Market Street Railway Company for twenty five years by ordinance approved January 22, 1901, hereinafter referred to as the Central Market Franchise, duly conveyed, after foreclosure proceedings, to this company by deed dated March 1, 1907.

This company is the owner of certain other franchises previously granted to predecessors in title of The Columbus Railway Company but duly transferred and conveyed by said company to this company by the deed aforesaid of January 29, 1914, which said franchises were granted without limitation of time and are perpetual. The streets covered by these perpetual franchises are set forth in Section 20 of said Blanket Franchise ordinance under the heading "Perpetual Franchises." Said section reads as follows:

"The grants and provisions hereinbefore made and contained for the renewal of the franchise of the said The Columbus Railway Company on the streets and avenues hereinbefore mentioned in section 1 of this ordinance, shall in all respects apply to the
51 grants, rights, privileges and franchises of the predecessors in title of said The Columbus Railway Company, to construct, maintain and operate lines of street railway on Main street (formerly called Friend Street) from High street to Rose Avenue; on State Street from High street to Grant avenue; thence in a northerly direction on Grant Avenue to Oak street; thence on Oak street in an easterly direction to Sherman avenue, (formerly called Bruce street); on Long street from High street in an easterly direction to Mulberry street, and thence in a southerly direction on Mulberry street from Long street to Broad street; on Cleveland avenue in a northerly direction from Long street to Mt. Vernon avenue; thence in an easterly direction on Mt. Vernon avenue to Washington avenue; on West Broad street from High street to a point opposite the center of the east drive way to the Central Hospital for the Insane, (the same being the corporation line of the city of Columbus, as established by ordinance of the city of Columbus, passed on or about May 18, 1890); on Glenwood avenue in a southerly direction from Broad street to the Harrisburg pike; thence in a southwesterly direction on the Harrisburg pike to Green Lawn cemetery; as fully as if the routes and streets and avenues mentioned in this section were specifically mentioned and included in the first section of this ordinance, if, and so far as, the franchises in the streets and avenues mentioned in this section or either of them or any part thereof shall hereafter be judicially declared by a court of competent jurisdiction, or by any appellate court to which any suit brought to test any or all of said franchises shall be brought, may be carried by proceedings in error or on appeal, not to be franchises in perpetuity.

"It is expressly provided that nothing contained in this ordinance is intended, nor shall anything herein be construed to be, a con-

cession by said city of Columbus of the validity of any claim
52 of said company to perpetual franchises to operate lines of street railroad in all or any of the streets and parts of streets named in this section.

"It is further expressly provided, that nothing contained in this ordinance shall be pleaded or considered to be a bar to any suit or suits which may hereafter be brought in any court or courts of competent jurisdiction, seeking to test the validity of any claim or claims to said company to perpetual franchises to operate any line or lines of street railroad upon any of the streets or parts of streets mentioned in this section."

Under the provisions of the Blanket Franchise and the Central Market Franchise, this company has for a number of years been issuing and selling eight tickets for twenty-five cents and giving universal free transfers thereon, which represents a lower street railway fare than is in force in any city in the United States and is under present circumstances non-compensatory and confiscatory.

The street railway property of this company is worth more than twelve millions of dollars on any reasonable basis of investment or physical value. The bonds outstanding fairly chargeable against the street railway property amount to $7,225,000 on which the annual interest charge amounts to over $333,000. Under the law, this company is entitled to earn from the operation of its street railway lines a fair return upon the value of the property which it employs in furnishing street railway service to the people of the city of Columbus.

Recently the operating expenses of this company, as of all other street railway companies, have greatly increased, owing to the increased and increasing cost of all materials and supplies, in many instances more than one hundred per cent, and to the higher wages
that all such companies have been required to pay to their
53 employes. The taxes and necessary replacement and other depreciation charges have also materially increased. Take, for example, the coal bill; in the year 1915, this company paid for coal required to operate its street railway lines the sum of $60,164; the bill, in the year 1916, was the sum of $81,354; and in the year 1917, the bill increased to the sum of $234,838. Also, the wage account of the railway employes of this company, in the year 1916, amounted to the sum of $806,336; but in the year 1917, it had increased to the sum of $887,994. These large increases in operating and maintenance expenses have resulted in corresponding decreases in the net earnings of this company. Its street railway net earnings for the twelve months ending June 30, 1918, after deducting operating expenses and taxes and setting aside a proper amount to represent depreciation, were only the sum of $301,987, which was not enough to pay the interest on the bonds outstanding properly chargeable against the street railway property of this company.

In the month of June, 1918, railway employes of this company demanded higher wages, and, after some negotiations, the controversy was submitted for arbitration to the National War Labor Board. By the decision of that Board, rendered July 31, 1918, the

wages of the railway employes of this company were increased over fifty per cent, resulting in an increase of more than $560,000 over the highest amount ever paid by this company to its railway employes in any one year. With this increase, the wages required to be paid by this company to its railway employes will be more than $1,500,000 per year.

It will thus be seen, that although this company was not earning a fair return on its street railway property prior to the wage increase fixed by the National War Labor Board, the added burden of the Board's wage award will result in leaving this company without any net earnings whatever. In fact, its gross earnings will fall
54 short by more than $250,000 of meeting its operating expenses, without allowing anything whatever for interest on its bonds, which interest must be paid.

This company is a public utility upon which the law imposes certain duties and obligations, including the duty of maintaining its property in good order and repair, so that it may render adequate and satisfactory service to the public. This company can not do this unless it receives sufficient revenue from the operation of its cars, which means that the rates must be adequate. The rates prescribed in those two franchise ordinances are inadequate and confiscatory, and all rights of the city and of the public thereunder are and must be subject and subordinate to the provisions of the Fourteenth Amendment to the Constitution of the United States prohibiting the State or any municipality therein from depriving this company of its property without due process of law, that is, in the present case, from forcing upon this company inadequate and confiscatory rates of fare.

On February 25, 1918, this company, appreciating the situation then existing, requested in writing the city council of the city of Columbus to authorize this company to charge higher rates, but this request was summarily refused. A later request for relief was also refused, notwithstanding the belief expressed by the Mayor and some members of the City Council that relief should be granted.

Increased revenue and proper compensation for service rendered are necessary in order that this company may continue to perform its public duties. And this fact was recognized by the National War Labor Board, which in its award granting large increases in the wages of this company's railway employes, said:

"This increase in wages will add substantially to the operating cost of the company and will require a reconsideration by the proper regulating authority of the fares which the company is allowed by law to collect from its passengers. We make part of this
55 award the words we have used in the award in the Cleveland case: We have recommended to the President that special congressional legislation be enacted to enable some executive agency of the Federal Government to consider the very perilous financial condition of this and other electric street railways of the country, and raise fares in each case in which the circumstances require it. We believe it to be a war necessity justifying Federal interference. Should this be deemed unwise, however, we urge upon the local au-

thorities and the people of the locality the pressing need for such an increase adequate to meet the added cost of operation."

And again that Board in its award said:

"In justice the public should pay an adequate war compensation for a service which can not be rendered except for war prices. The credit of these companies in floating bonds is gone. Their ability to borrow on short notes is most limited. In the face of added expenses which this and other awards of needed and fair compensation to the employes will involve, such credit will completely disappear. Bankruptcy, receiverships and demoralization, with failure of service, must be the result. Hence our urgent recommendation on this head."

This company must now refuse to continue the plan of issuing and selling eight tickets for twenty-five cents with universal free transfers, and now hereby surrenders, relinquishes and cancels the aforesaid Blanket Franchise and the aforesaid Central Market Franchise, and it will no longer operate its cars thereunder. It will hereafter consider and hold itself a tenant at sufferance in those streets which are not covered by its perpetual franchises, and it will withdraw from those streets whenever the city notifies it to do so. In order to give street railway service to the people of the city of Columbus, this company will continue to operate its street
56 railway lines, but not under said two franchises or either of them, upon all of the streets of the city until notified by it to withdraw from those streets not covered by the aforesaid perpetual franchises.

This company does hereby give further notice to the city that it will at once discontinue the sale of eight tickets for twenty five cents and the giving of universal free transfers and that it will hereafter charge five cents for a single ride and one cent for each transfer, transfer slips to be used at designated transfer points. In regard to the tickets heretofore sold and now outstanding in the hands of the public, this company will accept and honor them as heretofore.

Respectfully submitted,

By order of the Board of Directors,

THE COLUMBUS RAILWAY, POWER & LIGHT COMPANY.

By S. G. McMEEN, *President.*

57 And afterwards, to-wit: on the 20th day of August, A. D. 1918 came the Plaintiff, by its Solicitors, and filed in the Clerk's Office of said Court its Motion for Temporary Restraining Order and Preliminary Injunction, which said Motion is clothed in the words and figures following, to-wit:

*Motion for Temporary Restraining Order and Preliminary Injunction.*

In the United States District Court for the Southern District of Ohio, Eastern Division.

No. —. In Equity.

THE COLUMBUS RAILWAY, POWER AND LIGHT COMPANY, a Corporation of the State of Ohio, Plaintiff,

vs.

THE CITY OF COLUMBUS, OHIO, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck and Fred P. Zimpfer, Members of the City Council of said City, Defendants.

Motion for Temporary Restraining Order and Preliminary Injunction.

The plaintiff in the above entitled suit now hereby moves the court to grant it, pending the suit, a temporary restraining order and preliminary injunction against the defendants, and each of them, their officers, servants, employes and agents, and their respective successors in office, as prayed for in the bill of complaint herein.

WILLIAM O. HENDERSON,
HENRY J. BOOTH,
HENDERSON & BURR,
BOOTH, KEATING, POMERENE & BOULGER.

*Solicitors for Plaintiff, The Columbus Railway, Power & Light Company.*

JOSEPH S. CLARK,
HENRY A. McCARTHY,
*Of Counsel.*

58 And afterwards, to-wit: on the 23rd day *od* August, A. D. 1918, came the Defendants by their Solicitors, and filed in the Clerk's Office of said Court, their certain Motion to Dismiss, clothed in the words and figures following, to-wit:

*Motion to Dismiss.*

In the United States District Court for the Southern District of Ohio, Eastern Division.

In Equity.

No. —.

THE COLUMBUS RAILWAY, POWER & LIGHT COMPANY, a Corporation of the State of Ohio, Plaintiff,

vs.

THE CITY OF COLUMBUS, OHIO, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck and Fred P. Zimpfer, Members of the City Council of said City, Defendants.

Motion to Dismiss.

Now come all the defendants in the above entitled action, and move the Court to dismiss this action and that they take their costs in this suit incurred for the following reasons:

I.

That there is no diversity of citizenship in this cause as a basis of the jurisdiction of the Court.

II.

The plaintiff's bill does not show that any federal question is made for the consideration of this Court.

III.

That there is insufficiency of fact to constitute a valid cause of action in equity against these defendants or either of them.

IV.

The bill does not state any facts which show that the Fourteenth Amendment to the Constitution of the United States has been vio-

lated, or that any right of the plaintiff under that Amend-
59 ment has been invaded by the defendants, or either of them.

HENRY L. SCARLETT,
*The City Attorney of Columbus, Ohio,*
*Solicitor for Defendants.*

JOSEPH A. GODOWN,
*Of Counsel.*

And afterwards, to-wit: on the 24th day of August, A. D. 1918, an Order was entered in the above entitled cause, clothed in the words and figures following, to-wit:

*Order of Disqualification of Judge J. E. Sater, District Judge.*

60 United States District Court, Southern District of Ohio,
Eastern Division.

In Equity.

No. 104.

THE COLUMBUS RAILWAY, POWER & LIGHT COMPANY, a Corporation of the State of Ohio, Plaintiff,

vs.

THE CITY OF COLUMBUS, OHIO, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck and Fred P. Zimpfer, Members of the City Council of said City, Defendants.

This day this cause came on to be heard, and it appearing to the court from the issues made and from the statements of counsel that the determination of this cause and the issues therein involved will reflect upon and affect the value of the stocks and other securities issued by the plaintiff;

And it further appearing that a member of the Court's family is one of the plaintiff's stockholders;

It is Now Therefore Hereby Certified that, by reason of the premises, this court is disqualified from sitting in the trial of this cause and from hearing and determining any of the issues therein presented; and it is ordered that this certification be entered by the Clerk upon the records of this court and that such Clerk transmit to the Circuit Judges of this Judicial Circuit a copy of such certification; which said Judges (or some one of them) are hereby requested to designate another Judge to appear at Columbus, Ohio,

or elsewhere within this District, in the reasonably near future, and hear this cause and the issues therein tendered.

J. E. SATER,
*United States District Judge,*
*Southern District of Ohio.*

[Endorsed:] No. 104. In Equity. United States District Court, Southern District of Ohio, Eastern Division. The Columbus Railway, Light & Power Co., Plaintiff vs. The City of Columbus, Ohio, et al., Defendants. Filed Aug. 24, 1918. B. E. Dilley, Clerk.

And afterwards, to-wit: on the 2nd day of September, A. D. 1918, an Order was entered in the above entitled cause, clothed in the words and figures following, to-wit:

61 *Designation of D. C. Westenhaver, District Judge.*

UNITED STATES OF AMERICA,
*Sixth Judicial Circuit, ss:*

To the Honorable D. C. Westenhaver, District Judge of the United States for The Sixth Judicial Circuit:

Whereas, it duly appearing that one of the United States District Judges for the Southern District of Ohio is disqualified by interest from sitting in the trial of the cause pending therein (No. 104 in Equity, Eastern Division), in which the Columbus Railway, Power and Light Company is plaintiff and the City of Columbus, Ohio, and others are defendants, and from hearing and determining any of the issues therein presented; and it further appearing that the other judge of said district court is absent from the district; and it further appearing that one or more of the issues in said cause require prompt hearing and determination; therefore, I the undersigned, being the senior circuit judge in said Circuit qualified to act in the premises, do hereby, in pursuance of Sections 14, 17 and 20 of the Judicial Code, designate and appoint you to hold the said District Court in place or in aid of the proper district judge of said district, and to exercise within the district, from the second day of September to the 31st day of December, 1918, in said cause, the same powers that are vested in the judge thereof.

August 31, 1918.

LOYAL E. KNAPPEN,
*United States Circuit Judge,*
*Sixth Judicial Circuit.*

[Endorsed:] 104. Col's Ry. Power & Lt. Co. v. City of Columbus, et al. Designation. Filed Sept. 2, 1918. B. E. Dilley, Clerk.

And afterwards, to-wit: on the 3rd day of September, A. D. 1918, there was filed in the Clerk's Office of said Court a certain Affidavit in said cause, which said Affidavit is clothed in the words and figures following to-wit:

62 *Affidavit of Samuel G. McMeen.*

In the United States District Court for the Southern District of Ohio, Eastern Division.

In Equity.

No. 104.

THE COLUMBUS RAILWAY, POWER AND LIGHT COMPANY, a Corporation of the State of Ohio, Plaintiff,

v.

THE CITY OF COLUMBUS, OHIO, et al., Defendants.

On Motion to Dismiss and Motion for Temporary Restraining Order.

*Affidavit of Samuel G. McMeen.*

STATE OF OHIO,
*Franklin County, ss:*

Personally appeared before me, a notary public in and for said county, the said Samuel G. McMeen, who being duly sworn according to law, did depose and say: That he is the president of The Columbus Railway, Power and Light Company; that he has read the affidavit of Norman McD. Crawford prepared to be filed in this case; that the facts set forth therein are true; that in addition to said facts deponent says that ever since the war in Europe broke out the operating expenses of all of the street railway companies in the United States have very materially increased, resulting in reduced income; that a great many of such street railway companies have made applications for relief in the shape of higher street railway fares to the local authorities, including the city councils and public service commissions, and that in a great many cases relief
63 has been granted; that the necessity of providing additional revenue by increasing street railway fares has already been fully demonstrated by the rapidly increasing cost of operation, and is fully recognized by the granting of such relief in about 250 municipalities of this country, a recent list of such increases granted by state commissions, by city councils and by new schedules filed without protest by the local authorities, showing the present fares in various cities classified as follows, said classification showing the prevailing rates of fare after such increases:

| | |
|---|---|
| Ten-cent Fare | 3 cities. |
| Eight-cent Fare | 1 city. |
| Ten-cent Owl Service—7-cent Regular | 1 city. |
| Ten-cent Owl Service; 6-cent Regular | 1 city. |
| Ten-cent Owl Service; 5-cent Regular | 5 cities. |
| Seven-cent Fare | 43 cities. |
| Six-cent Central Zone with Additional Charge for Ride Outside | 16 cities. |
| Six-cent Fare | 86 cities. |
| Six-cent Fare on Part, Five-cent Fare with Additional Cent for Transfer on Remainder | 1 city. |
| Five-cent Central Zone with Additional Charge for Ride Outside | 11 cities. |
| Five-cent Fare; One-cent Charge for Transfer | 17 cities. |
| Reduced Rates Eli-nated | 42 cities. |
| Four-cent Fare; One-cent Charge for Transfer | 1 city. |
| Workmen's Reduced Rates Abolished | 18 cities. |

Deponent further says that the necessity for relief in the shape of higher street railway fares is directly due to the increase in operating expenses which is directly due to the war emergency; that the War Labor Board appointed by the President of the United States has expressly recognized the necessity for higher street railway fares and has publicly recommended to all local authorities with power to increase street railway fares that they should exercise this authority and give appropriate increases. The War Labor Board is particularly interested in this proposition because it has found it
64 necessary in settling labor controversies to award very great increases in the wage accounts of the street railway companies, and it has recognized the fact that the only way that these increased operating expenses can be met was by increased fares; and further deponent saith not.

SAMUEL G. McMEEN.

Sworn to before me and subscribed in my presence this 3rd day of September, 1918.

[SEAL.] A. T. BURINGTON,

*Notary Public in and for said County.*

And afterwards, to-wit: on the 3rd day of September, A. D. 1918, there was filed in the Clerk's Office of said Court, a certain Affidavit, in said cause, which said Affidavit is clothed in the words and figures following, to-wit:

65 *Affidavit of Norman McD. Crawford.*

In the United States District Court for the Southern District of Ohio, Eastern Division.

In Equity.

No. —.

THE COLUMBUS RAILWAY, POWER AND LIGHT COMPANY, a Corporation of the State of Ohio, Plaintiff,

vs.

THE CITY OF COLUMBUS, OHIO, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck and Fred P. Zimpfer, Members of the City Council of said City, Defendants.

On Motion to Dismiss and Motion for Temporary Restraining Order.

*Affidavit of Norman McD. Crawford.*

STATE OF OHIO,
*County of Franklin, ss:*

Personally appeared before me a Notary Public in and for said State and County Norman McD. Crawford, who being sworn according to law, did depose and say that he is the Vice President of The Columbus Railway, Power & Light Company; that said Company owns and operates a system of street railways in the City of Columbus, Ohio, and in addition generates and sells electricity for light and power, and particularly sells a large amount of electricity for power purposes to industries in the City of Columbus, Ohio, and in territory adjacent to said City to be used by them for their
66 war purposes; that the demand for power for war purposes has been constantly increasing ever since the war broke out, and at the present time the facilities of said Company for the manufacture of power for these purposes as well as for its other purposes are being taxed almost to their limit; that some time ago the Company in anticipation of these increased and increasing demands for power for war purposes determined if possible to increase its generating ap-aratus by the installation of a new unit at a cost of approximately $750,000. It became necessary for the Company to finance the cost of this new unit and it determined to issue a series of $2,500,000 of two year notes to provide the necessary money and also to finance maturing obligations; that said Company several months ago made application to the War Finance Corporation which was

organized by the act of Congress, for the purpose of furnishing financial assistance to the public utilities and other corporations engaged in work necessary or contributory to the prosecution of the war. Said Company asked the War Finance Corporation to underwrite or purchase $1,000,000 of these $2,500,000 of notes; that upon the hearing of said application the first question asked representatives of said Company was in regard to the low schedule of street railway fares prevailing in the City of Columbus and whether it would not be possible to secure relief from the local authorities in the shape of higher fares. The Board of the War Finance Corporation was advised that efforts were being made to accomplish this result but they were obliged to admit that no success had at that time been obtained in this particular. Said Company's representatives urged upon the Board of the War Finance Corporation that the Company is extensively engaged in war work and that the installation of this new power unit is necessary in order to furnish the power which war industries in Columbus and territory adjacent thereto must
67 have in order to carry out their war work. The Board of the War Finance Corporation states that it did not see why the federal authorities should come to the assistance of the Columbus Company when assistance was refused by the local authorities. As the result of the hearing, however, the War Finance Corporation agreed to purchase and underwrite $750,000 of the new $2,500,000 of notes, provided the Company could place the remaining $1,750,000. Efforts to accomplish this result have been made by deponent and other representatives of The Columbus Company, said deponent having interviewed on this subject people in the Cities of Cincinnati, Cleveland, New York and also other cities, and each time that the question has been discussed with prospective purchasers deponent has been met with the statement that the street railway fares in the City of Columbus are so low that said prospective purchaser is very loath to invest any money in the Company operating said street railway lines, and very recently further argument and objection have been made by said prospective purchasers that the city authorities have expressly encouraged and advised the street car riders in the city of Columbus to refuse to pay their fares; that the Columbus Company has not as yet been able to sell all of said $1,750,000 of notes, and it is therefore extremely doubtful whether the Company will be able to secure $750,000 from the War Finance Corporation to be invested in the City of Columbus and to make it possible for the Company to furnish the power to said war industries which they must have in order to carry out their war work.

And further deponent saith not.

NORMAN McD. CRAWFORD.

Sworn to before me and subscribed in my presence by the said Norman McD. Crawford, this 3rd day of September, A. D. 1918.

[SEAL.] HARRY M. RUNKLE.

*Notary Public in and for said Franklin County, Ohio.*

68 And afterwards, to-wit: on the 3rd day of September, A. D. 1918, an Entry was made on the Journal of said Court in said cause, which said Entry is clothed in the words and figures following, to-wit:

*Order—Leave to File Amended Bill.*

No. 104.

THE COLUMBUS RY., POWER & LIGHT CO.

vs.

CITY OF COLUMBUS et al.

For good cause shown, leave is granted plaintiff to file an amended bill of complaint and the same is filed.

And afterwards, to-wit: on the 3rd day of September, A. D. 1918, came the Plaintiff by its Solicitors and filed in the Clerk's Office of said Court, its certain Amended Bill of Complaint, against said Defendants, which said Amended Bill of Complaint is clothed in the words and figures following, to-wit;

69 *Amended Bill of Complaint.*

In the United States District Court for the Southern District of Ohio, Eastern Division.

In Equity.

No. 104.

THE COLUMBUS RAILWAY, POWER AND LIGHT COMPANY, a Corporation of the State of Ohio, Plaintiff,

vs.

THE CITY OF COLUMBUS, OHIO, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck and Fred P. Zimpfer, Members of the City Council of said City, Defendants.

Amended Bill of Complaint.

To the Honorable the Judges of the District Court of the United States for the Southern District of Ohio, Eastern Division:

The plaintiff, The Columbus Railway, Power and Light Company, complains and says:

1. The plaintiff is a corporation of the State of Ohio duly incorporated, organized and existing for the purpose, among others, of acquiring by purchase or lease, constructing, extending, owning, maintaining and operating by means of electricity, street railroads or interurban railroads, or both, in the City of Columbus, County of Franklin and State of Ohio, and lines of such railroads extending from said city, within, through and between the municipali-
70 ties located in said county and in territory contiguous to said county, with such termini as are or may be designated in the several ordinances, resolutions and orders granting and establishing the same; and it owns and operates, among other things, a system of street railway lines in the City of Columbus, Ohio.

2. The defendant, the city of Columbus, Ohio, is a municipal corporation of the State of Ohio duly incorporated, organized and existing under the laws of said State. The defendant, George J. Karb, is the duly elected, qualified and acting Mayor of said City of Columbus. The defendant, Henry L. Scarlett, is the duly elected, qualified and acting City Attorney and City Solicitor of said city. The defendant, James J. Thomas, is the duly elected, qualified and acting City Clerk of said city. And the defendants, Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Arthur P. Lamneck, Joseph C. Nailor, Edgar L. Weinland and Fred P. Zimpfer, are the duly elected, qualified and acting members of the City Council of said city.

3. This suit is a civil suit, and the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.

4. The plaintiff and its predecessors in title have since the enactment of the two ordinances mentioned in this paragraph and until the 20th day of August, 1918, been operating said system of street railway lines in the City of Columbus, which system consists of more than one hundred and ten (110) miles of track with necessary switches, turn outs and overhead construction, under two certain franchises granted by said city, to-wit:

(*a*) A franchise granted by an ordinance, entitled:

71 "An Ordinance, No. 17801,

Renewing to The Columbus Railway Company, for a term of twenty-five (25) years, its grants, rights, privileges and franchises, to maintain and operate its tracks and lines of street railroad upon the streets and avenues, and parts of streets and avenues, hereinafter mentioned, in the City of Columbus, Ohio, and prescribing the terms and conditions thereof, and repealing the provisions of any and all ordinances and resolutions, and parts of ordinances and resolutions, inconsistent with the terms of this ordinance," said ordinance having been duly passed by the City Council of said city on February 4, 1901, and duly approved by the Mayor of said city on February 6, 1901, and all rights and privileges thereunder having been thereafter transferred and conveyed by said The Columbus Railway Company to the plaintiff by deed dated January 29, 1914. This franchise ordinance has been sometimes called and is here-

after referred to as the Blanket Franchise Ordinance, and a copy thereof is hereto attached, marked "Exhibit No. 1," and referred to for greater certainty.

(*b*) A second franchise granted by an ordinance entitled:

"An Ordinance, No. 17802,

Granting permission to The Central Market Street Railway Company, its successors and assigns, to construct, operate and maintain a single or double track street railway, with necessary sidetracks, curves, turn-outs and switches in the following streets of the city of Columbus, Ohio, towit: Rich street, Fifth street, Donaldson street, Livingston avenue, Mohawk street, Reinhard avenue, Jaeger street, Hanford street, Fourth street, Hosack street, Innis avenue and Parsons avenue to the south corporation line of said City of Columbus," said ordinance having been duly passed by the City Council of said city on January 21, 1901, and duly approved by the Mayor of said city on January 22, 1901, and all rights and privileges thereunder having been transferred and conveyed, after foreclosure proceedings, to the plaintiff under its former name of The Columbus Traction Company, by deed dated March 1, 1907. A copy of this second franchise ordinance, which is hereafter referred to as the
72 Central Market Franchise Ordinance, is hereto, attached, marked "Exhibit No. 2" and referred to for greater certainty.

5. In addition to said Blanket Franchise and said Central Market Franchise, certain other franchises were previously granted by said City of Columbus to predecessors in title of The Columbus Railway Company, as follows, towit:

On Main street, (formerly called Friend street) from High street to Rose avenue; on State street from High street to Grant avenue; thence in a northerly direction on Grant avenue to Oak street; thence on Oak street in an easterly direction to Sherman avenue, (formerly called Bruce street); on Long street from High street in an easterly direction to Mulberry street, and thence in a southerly direction on Mulberry street from Long street to Broad street; on Cleveland avenue in a northerly direction from Long street to Mt. Vernon avenue; thence in an easterly direction on Mt. Vernon avenue to Washington avenue; on West Broad street from High street to a point opposite the center of the east driveway to the Central Hospital for the Insane, (the same being the corporation line of the City of Columbus as established by ordinance of the City of Columbus, passed on or about May 18th, 1890); on Glenwood avenue in a southerly direction from Broad street to the Harrisburg pike; thence in a southwesterly direction on the Harrisburg pike to Greenlawn cemetery.

All of these last mentioned franchises were granted without limitation of time and are perpetual. They were duly and legally transferred and conveyed to said The Columbus Railway Company and by said Company conveyed to the plaintiff by the aforesaid deed dated January 29, 1914. The streets covered by these perpetual franchises are set forth in Section 20 of said Blanket Franchise

Ordinance, Exhibit No. 1, and the claim of said The Columbus Railway Company that they are perpetual is recognized by said city in said section but is not there admitted. Reference to said section which appears in Exhibit No. 1 is hereby made. All of the franchises mentioned in this paragraph and the last preceding paragraph were duly accepted by the grantees thereof respectively.

6. Under the terms and provisions of said Blanket Franchise Ordinance, Exhibit No. 1, the grantee and its successors and
73 assigns were required in due course as therein provided to issue and sell, and they did issue and sell, eight tickets for twenty-five cents, and to give, and they did give, universal free transfers thereon. The issue and sale of these tickets with universal free transfers was instituted April 1, 1912, and continued until August 20th, 1918, when said franchise was surrendered and cancelled by the plaintiff as hereinafter stated.

7. Under said Central Market Franchise ordinance, Exhibit No. 2, that company issued and sold eight tickets for twenty-five cents and gave universal free transfers, and continued to do this so long as it remained the owner of said franchise; and the plaintiff has continued the issuing and selling of eight tickets for twenty-five cents and giving such transfers ever since it became the owner of said franchise until August 20th, 1918, when said franchise was surrendered and cancelled by plaintiff as hereinafter stated.

8. The plaintiff in the operation of said system of street railway lines has developed and is conducting an extensive business in the carrying of street railway passengers in said city; and, during the year 1917, averaged 224,162 car rides per day, and during said year carried on its said lines in said city a total of 81,819,395 passengers, for which it received the sum of two and six tenths (2-6/10) cents per car ride, and no more. A person riding upon a transfer is counted as a passenger in the above figures. The plaintiff, by its said street railway system, including more than 110 miles of main track, supplies the only street railway service in said city of Columbus and its suburbs, except a very limited service furnished by interurban cars running at long intervals upon certain streets. Plaintiff also supplies power for war and industrial purposes and is the only commercial company furnishing electricity for such purposes in said city and its suburbs. Said city of Columbus and its suburbs contain a population of more than 250,000 and constitute a large industrial, manufacturing, military and railroad center in which are located numerous shops, factories and plants wherein more
74 than 25,000 persons now are, and for a long time will be, employed in the manufacture of munitions, clothing and a great variety of other war materials for use directly by the United States Government and for use by those who are furnishing war supplies to and for the Government, in the prosecution of the present war; also large railroad shops in which are employed many thousands of persons who are, and will continue to be, engaged in the manufacture and repair of railroad engines, cars and other equipment used and to be used by the United States Railroad Administration in its maintenance and operation of the railroad systems of the

United States; also a very large supply station for the storage and distribution of munitions and other supplies for Government use, at which are employed more than 2000 persons. A large majority of said employes in said shops, factories and plants, in said railroad shops and at said supply station, do and must depend upon the street railway service of the plaintiff as their means of transportation to and from their places of employment; and in said area is located also the Columbus Barracks in which are quartered more than 100,000 recruits per annum, who also are dependent upon said street railway service. The discontinuance or impairment of the plaintiff's street railway service would cause irreparable harm to the Government of the United States, to the City of Columbus and to all persons dependent upon said service.

9. The plaintiff has now invested in said street railway lines and equipment, on a conservative basis of investment and physical value, more than twelve millions of dollars. The plaintiff and its predecessors in title have from time to time issued and sold, and there are now outstanding in the hands of bona fide holders for value, mortgage bonds in large amounts, of which the sum of $7,295,000., at least, are chargeable against its street railway property, the annual interest charge upon which is more than $333,000.

75 10. The plaintiff, since it became the owner and operator of said system of street railway lines in the year 1914, has operated and managed, and is now operating and managing, said system efficiently, economically, conservatively, intelligently, safely and at the lowest possible cost consistent with adequate and sufficient service to the public. Notwithstanding such operation and management, the results have shown increased and increasing costs of operation and decreased and decreasing net revenue, which said increased and increasing costs of operation and decreased and decreasing net revenue have been caused by and are the direct result of the war in which the United States is now engaged.

The cost of coal necessary to generate the power required to operate said street railway lines has shown a marked increase. The plaintiff paid for coal for this purpose, in the year 1915, the sum of $60,164.; in the year 1916, the sum of $81,354.; and, in the year 1917, the sum $234,838. The plaintiff has also been obliged to increase materially the wages paid to its employes. In the year 1916, it paid in wages to its railway employes the sum of $806,336., and, in 1917, the sum of $887,984.

The net earnings derived from the operation of said street railway lines for the twelve months ending June 30, 1918, after deducting operating expenses, taxes, and a proper charge for depreciation, were $301,987., an amount insufficient by more than $31,000. to pay the interest on said $7,295,000. of bonds outstanding properly chargeable against plaintiff's street railway property, and barely enough to pay two and one-half (2½) per cent. upon the value of the property employed by plaintiff in furnishing street railway service to the people of Columbus.

11. During the month of June, 1918, street railway employes of plaintiff demanded a further increase in their wages, which plaintiff

could not pay, and thereupon said employes inaugurated a strike which caused plaintiff's said service to be entirely discon-
76 tinued for two days; and, after some negotiations, the controversy was referred to the National War Labor Board for decision, and that Board, on July 31, 1918, rendered its decision, the result of which is that plaintiff must increase the wages of its street railway employes more than fifty per cent. This increase in the wage account will increase the operating expenses of the street railway lines of plaintiff about $560,000. per year. Plaintiff therefore says that as the result of its said operations for the current year ending June 30, 1919, its gross earnings therefrom will fall short of paying its operating expenses, depreciation and taxes by approximately $250,000., and that there will be no earnings whatever with which to pay its said interest charges or to yield any return to plaintiff upon the value of its property employed in furnishing street railway service to the people of the City of Columbus.

12. On the 20th day of August, 1918, plaintiff surrendered and cancelled both said Blanket Franchise and said Central Market Franchise by notification in writing addressed to the City of Columbus, Ohio, the Mayor, City Council and City Clerk of said city. A copy of this written notice is hereto attached, marked "Exhibit No. 3" and referred to for greater certainty. Plaintiff asks that the facts set forth in such written notification be considered as part of this amended bill of complaint with the same force and effect as if repeated in full herein.

13. The plaintiff charges that the rates of fare prescribed by the terms and conditions of said two franchises last above mentioned were not either before or when said franchises were surrendered and cancelled as hereinbefore stated, and would not be if longer enforced against the plaintiff, sufficient to enable it to maintain its street railway property in good order and repair and to perform its duty as a public utility, and particularly to furnish the street railway service hereinbefore in paragraph 8 set forth; that the further
77 operation of plaintiff's street railway lines in said city under said two franchises referred to in this paragraph would be not only impracticable but impossible, both financially and otherwise, and that the enforcement of said rates of fare would violate the Fourteenth Amendment to the Constitution of the United States, in that said rates of fare are inadequate and confiscatory, and their enforcement would deprive the plaintiff of its property without due process of law. The plaintiff further charges, that by reason of the facts herein stated and by reason of the nature and character of said two franchises, it was fully warranted and justified in surrendering and cancelling them.

14. The plaintiff further charges that the defendants threaten, and will, unless restrained and enjoined by this court, attempt, to force it to continue to operate its street railway lines under said Blanket Franchise and said Central Market Franchise upon all of the streets of said city, including those streets covered by the aforesaid perpetual franchises, and to force it to continue to issue and sell eight

tickets for twenty-five cents and give universal free transfers; and that said threat of the defendants, if carried out, would compel the plaintiff to carry passengers upon its said lines at inadequate and confiscatory rates, in violation of said Fourteenth Amendment to the Constitution of the United States.

15. In anticipation of a controversy between said city on the one side and the plaintiff on the other over the right of the plaintiff to surrender and cancel the aforesaid two franchises and its right to put into force and effect its new rates of fare, the details of which are set forth in Exhibit No. 3 of this amended bill of complaint, the plaintiff is giving and will continue to give to its passengers paying the new rates of fare appropriate rebate checks representing the difference between the new rates of fare and those prescribed by the aforesaid two ordinances, and it will redeem said
78 rebate checks provided it shall be finally decided that the plaintiff was not justified in adopting said new rates of fare.

16. The plaintiff further says that the enforcement by the defendants or any of them of the aforesaid two franchise ordinances, or either of them, or an attempt by them to enforce the same, would cause the plaintiff immediate and irreparable injury, loss and damage; and that it has no adequate remedy at law in the premises.

17. The plaintiff further says that this amended bill of complaint presents a case within the jurisdiction of this court of equity in view of the controversies, confusion, risks and multiplicity of suits which would necessarily be occasioned by the resistance of the plaintiff to the enforcement of the inadequate and confiscatory rates of fare prescribed in the aforesaid two franchise ordinances, and that, in view of the public interests and the great number of people to be affected thereby, only a court of equity is competent to meet such an emergency and to determine once and for all and without a multiplicity of suits matters that affect not only individual persons, but also the interests of the entire community in the use of the public streets of the City of Columbus and in the administration of the affairs of the plaintiff, a quasi-public corporation, operating lines of street railway in said streets.

Wherefore, the plaintiff prays:

First. That the defendants and each of them make full, direct and true answer to the matters, all and singular, herein stated and complained of, but not under oath, this being hereby waived.

Second. That the defendants and each of them, their officers, servants, employes and agents, and their respective successors in office, be temporarily restrained and enjoined pending this suit, and, on final hearing, be forever enjoined from in any way forcing or compelling the plaintiff, or attempting to do so, to operate
79 its lines of street railway, or any of them, in the City of Columbus, under said Blanket Franchise ordinance or under said Central Market Franchise ordinance; from in any way forcing or compelling the plaintiff, or attempting to do so, to charge and collect only the rates of fare prescribed by the aforesaid two franchise ordinances for carrying passengers upon its lines of street railway

in said city; from in any way enforcing against the plaintiff, or attempting to do so, the aforesaid two franchise ordinances, or either of them, or any provision of either of them; from in any way interfering with the operation by the plaintiff of its lines of street railway on those streets in said city which are covered by the aforesaid perpetual franchises, said streets being the following, towit:

On Main street, (formerly called Friend street) from High street to Rose avenue; on State street from High street to Grant avenue; thence in a northerly direction on Grant avenue to Oak street; thence on Oak street in an easterly direction to Sherman avenue, (formerly called Bruce street); on Long street from High street in an easterly direction to Mulberry street, and thence in a southerly direction on Mulberry street from Long street to Broad street; on Cleveland avenue in a northerly direction from Long street to Mt. Vernon avenue; thence in an easterly direction on Mt. Vernon avenue to Washington avenue; on West Broad street from High street to a point opposite the center of the east driveway to the Central Hospital for the Insane, (the same being the corporation line of the City of Columbus as established by ordinance of the City of Columbus, passed on or about May 18th, 1890); on Glenwood avenue in a southerly direction from Broad street to the Harrisburg pike; thence in a southwesterly direction on the Harrisburg pike to Green Lawn cemetery;

and from in any way interfering with the plaintiff in its possession, control, management or operation of its said street railway property, or attempting to do so.

Third. That the plaintiff may have all such other and
80 further relief as to equity may seem meet and the nature of the case may require.

WILLIAM O. HENDERSON,
HENRY J. BOOTH,
HENDERSON & BURR,
BOOTH, KEATING, POMERENE & BOULGER,
*Solicitors for Plaintiff, The Columbus Railway, Power & Light Company.*

JOSEPH S. CLARK,
HENRY A. McCARTHY,
*Of Counsel.*

STATE OF OHIO,
*Franklin County, ss:*

Samuel G. McMeen, being first duly sworn, deposes and says that he is the President of the above named plaintiff, The Columbus Railway, Power & Light Company, which is a corporation, and is familiar with its business; that he has read the foregoing amended bill of complaint and knows the contents thereof; and that the facts

stated and allegations contained in said amended bill of complaint are true.

SAMUEL G. McMEEN.

Sworn to before me and subscribed in my presence by the said Samuel G. McMeen this 3rd day of September, A. D. 1918.

[SEAL.] HARRY M. RUNKLE,
*Notary Public in and for Franklin County, Ohio.*

81 EXHIBIT No. 1.

An Ordinance, No. 17,801.

Renewing to The Columbus Railway Company, for a term of twenty-five (25) years, its grants, rights, privileges and franchises, to maintain and operate its tracks and lines of street railroad upon the streets and avenues, and parts of streets and avenues, hereinafter mentioned, in the City of Columbus, Ohio, and prescribing the terms and conditions thereof, and repealing the provisions of any and all ordinances and resolutions, and parts of ordinances and resolutions, inconsistent with the terms of this ordinance.

(City Record Book 11, Page 524.)

Preamble.

Whereas, The Columbus Railway Company is the owner of and now engaged in operating certain lines of street railroad in the City of Columbus, Ohio, being the lines heretofore owned and operated by it, as well as those purchased from The Columbus Central Railway Company, and being the same lines enumerated in the title hereof; and

Whereas said several lines of street railroad owned by said The Columbus Railway Company, are held and operated by it under the authority of ordinances passed at various times, and for various periods, and containing various and inconsistent conditions as to the operation of lines of street railroad thereunder, and so limiting the franchises thereunder granted that they expire at different dates up to and including the year 1917; and

Whereas, In order to improve the service rendered by the said The Columbus Railway Company, it is desired that the several lines of street railroad now operated under separate and different franchise ordinances, may be operated by said company as one complete and entire system, thereby better accom-odating the public and facilitating the running of the cars of said company; and

Whereas, It is desired that the franchise rights of said The Columbus Railway Company to maintain and operate its tracks and lines of street railroad upon each and all of said several streets and avenues shall be made to expire at one and the same date; and

82 Whereas, it is desired that the burden to be borne by said The Columbus Railway Company in the way of payment of

cost of street cleaning, sprinkling, paving and repairs upon the several streets and avenues occupied by its lines, shall be uniform; and

Whereas, The provisions of the existing ordinances under which the said The Columbus Railway Company claims the right to maintain and operate its lines of street railway upon the several streets and avenues, prescribe different and varying rates of fare, and it is desired that there shall be uniformity in, and a reduction of, the rates of fare, and a general system of transfers, applicable to each and every part of the system of street railroads owned and operated by said The Columbus Railway Company; and,

Whereas, A renewal of the grants, rights, privileges and franchises of said The Columbus Railway Company, on the streets and avenues herein and hereinafter named, for said term of twenty five years, upon the conditions hereinafter prescribed in this ordinance, will be conducive to the public interests; now therefore,

Be it Ordained by the City Council of the City of Columbus, Ohio, as follows, towit:

Routes.

Section 1. That the franchises, rights and privileges of The Columbus Railway Company to maintain and operate its tracks and lines of street railroad, with all necessary switches, connections, turn-outs and other appliances suitable and proper for its use, together with the franchise, right and privilege to operate street railroad cars thereon, on the following streets and avenues, and parts of streets and avenues, in the City of Columbus, Ohio, viz:

On High Street from the south corporation line of the City of Columbus to its north corporation line, including the loop at Olentangy Park; on Chittenden avenue in an easterly direction, from High Street to The Cleveland, Cincinnati, Chicago and St. Louis Railway Company's tracks, and alongside said tracks in a southerly direction, forming what is known as the Fair Ground loop;

83 on Goodale street in an easterly direction, from High street to Fourth Street; on Chestnut street in an easterly direction from High Street to Fourth Street; thence on Fourth Street in a northerly direction to Naghten Street; thence on Naghten Street in an easterly direction to Neil Street; thence on Neil Street in a northerly direction to Mt. Vernon Avenue; thence on Mt. Vernon Avenue in an easterly direction to Cleveland Avenue; thence on Cleveland Avenue in a northerly direction to Buckingham Street; thence on Buckingham Street in an easterly direction to Jefferson Avenue; thence on Jefferson Avenue in a northerly direction to Leonard Avenue; thence on Leonard Avenue in an easterly and northeasterly direction to the north corporation line of the City of Columbus; on Mt. Vernon avenue in an easterly direction from Washington avenue to Taylor avenue; thence on Taylor Avenue in a northerly direction to Atcheson Street; thence on Atcheson Street in an easterly direction for a distance of two hundred (200) feet; on Livingston Avenue in an easterly direction, from High Street to Kelton Avenue, including the loop into the Driving Park as now built; on

Schiller Street in an easterly direction, from High Street to Parsons Avenue; on West Goodale Street in a westerly direction, from High Street to Neil Avenue; thence on Neil Avenue in a northerly direction to Eleventh avenue; on Fourth Street, from Livingston Avenue, in a northerly direction to Wyandotte Avenue; on Kelton Avenue, from Main Street, in a southerly direction to Livingston Avenue; on Rose Avenue, from Main Street, in a northerly direction to Fair Avenue; on Sandusky Street, in a southerly direction from Broad Street to Sullivant Avenue; thence on Sullivant Avenue, in a westerly direction, from Sandusky Street to Glenwood Avenue; on West Broad Street, from a point opposite the center of the east driveway of the Central Hospital for the Insane, (the same being the corporation line of the City of Columbus as established by an ordinance of the City of Columbus, passed on or about May 18th, 1890), to Hague Avenue; on Main Street in an easterly direction, from Rose Avenue to Alum creek; on Oak Street in an easterly direction, from Sherman Avenue (formerly called Bruce Street) to Fairwood Avenue; on Cleveland Avenue, from Buckingham Street northerly to
84 the north corporation — of said City of Columbus; on Neil Street from Naghten Street in a southerly direction to Spring Street; thence on Spring Street in a westerly direction to Front Street; thence on Front Street in a northerly direction to and over the Front Street bridge across the railroad tracks; thence along Park Street to Spruce Street; thence westerly on Spruce Street from Park Street to Dennison Avenue; thence on Dennison Avenue southerly to Montgomery Street; thence westerly on Montgomery Street to Harrison Avenue; thence on Harrison Avenue, northerly, from Montgomery Street to First Avenue; thence on First Avenue westerly, from Harrison Avenue to Pennsylvania Avenue; thence on Pennsylvania Avenue in a northerly direction from First Avenue to Fifth Avenue; on Front Street in a southerly direction, from Spring Street to Fulton Street; thence on Fulton Street in an easterly direction to Parsons Avenue; thence on Parsons Avenue in a southerly direction to the south corporation line; on Town Street from High Street in a westerly direction to Front Street; be and the same are hereby renewed to said The Columbus Railway Company, its successors and assigns, for and during the term of twenty-five years, from and after the passage of this ordinance; and the said The Columbus Railway Company is, and its successors and assigns are, hereby granted the franchise and right, and are hereby authorized and empowered to maintain and operate its lines of street railroad upon and over each and all of said streets and avenues, and parts of streets and avenues, aforesaid, for said period of twenty-five years, from and after the passage of this ordinance, upon and subject to each and every of the terms, conditions, stipulations and requirements hereinafter prescribed, and subject to the requirements of the general ordinances of the City of Columbus, Ohio.

To Connect Tracks.

Sec. 2. The said The Columbus Railway Company shall connect its tracks on High Street with the tracks of what was formerly known

as The Columbus Central Railway, at the intersection of High Street and Spring Street, at the intersection of High Street and Town Street, and at the intersection of High Street and Fulton Street, so that said lines may be operated as one system, in order to better accommodate the public; and said Company, shall have the right to connect, by suitable curves, tracks and appliances, its tracks at any points where they now intersect, or may hereafter intersect, at any time while this ordinance remains in force, under the direction and supervision, and according to plans and specifications to be approved by the Board of Public Works; and may maintain feed wire lines on any streets or avenues where they are now located, and elsewhere when needed, under like direction and supervision, and under plans to be approved by said board.

Provided, further, that said railroad company, in operating its lines of cars, shall make no change in the routes as now operated by it unless such change shall be first approved by resolution of the City Council of said City.

Street Repairs and Improvements.

Sec. 3. The said The Columbus Railway Company, shall keep in repair all that portion of said streets and avenues included within lines drawn one foot on the outside of the outer rails of its tracks; and shall pay for the cleaning, sweeping and sprinkling of said portion of the public way occupied by it and one foot on the outside of its outer rails, at the same rate and in the same manner required of abutting property owners for the residue of the public ways adjacent to said strip. If the City Council at any time orders the improvement of the roadway of any of said streets and avenues, by laying down thereon a pavement of any kind, said company shall, at its own expense, improve that portion occupied by its tracks and one foot on the outside thereof, with the same character of materials; or, if on the said streets or avenues a pavement has already been laid, and an assessment therefor placed on the tax duplicate, said company shall pay to the Director of Accounts of the City of Columbus, Ohio, such portion of the assessment for said improvement as the space occupied by said tracks and one foot on the outside of the outer rails bears to the entire width of the improved roadway; such sum to be by the Director of Accounts paid to the City Treasurer, and by him to be credited to any portion of the assessment made for the cost of such improvement, remaining due from, and unpaid by, the several abutting property owners; provided, that if in any case the amount so paid shall exceed the unpaid assessments, the excess shall be by the Director of Accounts paid to the abutting property owner entitled thereto.

Pavements.

Sec. 4. The pavements provided for in this ordinance shall be laid at such height or grade as may be fixed or determined by the Board

of Public Works, and shall, during the existence of this ordinance or grant, or any extension, amendment or renewal thereof, be kept in repair under the direction and supervision of such officers as may be from time to time vested by law or ordinance of the City Council with the control and supervision of the Public Highways and Works of said City; and on the failure of the company to make said repairs within thirty (30) days after receiving notice so to do from the City Council, the City Council may make the same or cause the same to be done, and said City of Columbus shall collect all the cost and expense thereof from said Company, and the entire amount of such cost and expense shall constitute a lien and charge upon the property and franchise of said Company the same as if formally levied and assessed as in the case of other municipal improvements. Whenever the said railroad is being put down on any unimproved street or streets, said Company shall grade the street or streets from curb to curb at its own expense on a level with its tracks.

Damage Indemnity.

Sec. 5. Said Railway Company shall, at all times hereafter, defend, indemnify and keep harmless the City of Columbus from any and all damages, lawful claims and demands for injuries to persons or property, the cost and expense of which said city may be subjected to or made liable for, by any proceedings at law or in equity, or otherwise, growing out of the grant of the privileges in this ordinance granted or out of the exercise or enjoyment of the same by said Company, or out of the failure of said Company to construct and keep in repair the pavement or other improvement by it herein required, or authorized, to be constructed and maintained; and said company may, at its own cost, defend against such actions, either in its own name or in the name of the City of Columbus.

87 Temporary Track Removals by City.

Sec. 6. The said City of Columbus shall have the right to temporarily remove or obstruct, or authorize the same to be done, any portion of the railroad tracks of said company, whenever and wherever it shall be necessary in laying down or repairing water pipes, gas pipes, sewers, drains, gutters or cisterns, or to use hose or any other apparatus necessary to be used in extinguishing fires, or any other public work or improvement required to be done by said city, not disturbing the running of cars where it can be avoided, without incurring any liability for damages to said company.

Speed and Control of Cars.

Sec. 7. Said Company shall at all times conform to such reasonable rules and regulations as are, or may hereafter be prescribed by ordinance, as to the rate of speed it may run its cars; and when its cars are about to start, and when in motion, if reasonable cause there-

for exist, warning shall be given by gong or otherwise, to notify persons of immediate or approaching danger. No car shall be started or put in motion while any passenger is in the act of entering the same or alighting therefrom. Cars running in the same direction shall not approach nearer to each other than one hundred feet, unless from unavoidable necessity or on switches or turnouts. Gongs shall be sounded as a warning on all cars approaching each other from opposite directions, and on each car approaching street intersections, which the car is to pass from one street to another, where there are buildings to prevent persons on foot or persons in other vehicles on the street from seeing the approaching car; the warning last aforesaid to be given at a distance of not less than fifty feet from such street corner and from time to time until the car reaches such intersection.

Sewer and Water Pipes.

Sec. 8. The said City of Columbus shall not be liable in any
88 way to said company for damages it may sustain from the breaking or overflow of waters from, any sewer or drain, or from the breaking of any water pipe or gas pipe by reason of any change in the grade of said streets; and said company shall so construct its tracks as to fully protect from damage thereby any and all sewers, water pipes and mains, gas or other pipes running beneath the surface of the streets.

Snow and Ice.

Sec. 9. In case it becomes necessary for said company to remove snow and ice from its tracks on said streets, it shall not be left in such manner as to interfere with or impede travel or render the street dangerous.

Conductors and Motormen—Exercise of Caution.

Sec. 10. The conductors in charge of cars shall not allow any lady or child to enter or leave any car while in motion; and the conductors and motormen shall keep a vigilent watch for all teams, carriages, persons and obstructions upon or near the track, and upon first appearance of danger, shall give warning and stop the car if necessary, to prevent accident; and the motormen must always be on the front platform while the car is in motion.

Motive Power and Safe Equipment.

Sec. 11. Permission is hereby given said company to operate its entire lines of street railroad with any and all extensions that may hereafter be made thereto, by electricty, or such other motive power, other than animal or steam power, as shall be acceptable to the city. Said Company shall have the right to erect and maintain iron or wood

poles, painted and neat in appearance, wires, fixtures and conduits, and any and all other appliances or appurtenances that in the opinion of the city shall be found necessary. At and after dark all cars running shall be lighted and provided with suitable signal
89 lights. All cars shall be kept clean, and when the temperature is below 35 degrees Fahrenheit, shall be heated. No car shall be allowed to remain standing upon the line of any route for passengers or any other purpose so as to impede any other vehicle, but shall be subject to such police regulations as are or may be prescribed for any other vehicles so far as they may be applicable. No car or cars shall be used on such railroad if worn out, broken, or so constructed, or kept in such a condition as to imperil the lives, limbs or health of the passengers; provided, that if any time during the life of this grant or any extension thereof, said city shall require, by ordinance, all trolley wires or other elec ric wires in the principal business district of said city to be placed in conduits under ground, said company shall within a reasonable time after the passage of such ordinance, which time shall be fixed by said city, place all its trolley wires, and food wires within said district, under ground.

## Wires and Poles.

Sec. 12. In the erection or placing of wires or conduits and in the use of any and all other appliances and appurtenances found necessary to operate said company's lines of railroad, a plan of the same, showing all poles, wires and other appliances or appurtenances that said company shall desire to use, shall be submitted to and approved by the Board of Public Works. Said City shall have the right to fix the height of all wires and poles above the street, and the size and location of all poles and conduits in the street, to determine the places in the streets where any and all tracks, appliances and appurtenances shall be located, and to establish such regulations with reference to the Public Safety and protection as the city shall from time to time deem necessary and proper.

## 90 Interurban Lines.

Sec. 13. The said city hereby reserves the full right and power at any time during the life of the grant herein made to grant to any other company, corporation or individual, engaged in operating an interurban railroad to jointly use with said The Columbus Railway Company any track or part thereof owned or operated by said The Columbus Railway Company, which may be necessary to enable the cars operated on such interurban railroad to pass by the most direct route to and from High Street, if said cars shall enter said city west of High Street, and to and from High Street if said cars shall enter said city east of said High Street, and to and from Chestnut Street, if said cars shall enter said city north of Chestnut Street and to and from Town Street, if said cars shall enter said city south of Town Street, upon equitable terms of payment therefor to said The Columbus Railway Company, taking into consideration the value, cost of construction

and maintenance of the track or tracks and overhead construction so jointly used, the amount paid by said The Columbus Railway Company, its predecessors, successors and assigns, whether to said city or to abutting property owners, for street paving and the cost of maintaining the same upon such street or streets so occupied, the pro rata amount of taxes and assessments paid on such track or part thereof, and the cost of power used in operating such interurban cars. If such right to joint use be granted by said city and if terms of compensation therefor cannot be agreed upon by said The Columbus Railway Company and the corporation, company or individual applying for such joint use, within sixty days after such grant is made by said city, the terms of compensation therefor shall be submitted to arbitration, one arbitrator to be chosen by said The Columbus Railway Company, one by the corporation, company or individual applying for such joint use, these two to select a third arbitrator. The decision of said arbitrators, in the absence of fraud, accident or mistake of law or fact, shall be conclusive on both parties. But neither
91 such arbitration nor any appeal therefrom shall in any way delay such joint use and occupation, when so granted as aforesaid, provided such grantee of the right to such joint use shall first secure to the satisfaction and acceptance of said The Columbus Railway Company the payment of the compensation which may be awarded by said arbitrators. No interurban cars shall be operated over any track or tracks, or parts thereof of said The Columbus Railway Company under and by virtue of the foregoing provision of this ordinance authorizing said city to compel such joint use, more frequently than one car each way every thirty minutes. Said The Columbus Railway Company is hereby authorized and empowered to make and carry out contracts or traffic arrangements, for the use of any of its tracks or any part thereof, by interurban cars of a gauge different from that of its own cars, and, with the consent of said city to permit the laying and the use of a third rail for said purpose; but it shall not permit such joint use or the laying of such third rail except over such route as may be necessary to enable such interurban cars to reach, and return from, the tracks now known as the interurban loop as now existing or hereafter modified. It is intended and understood that the phrases "interurban cars" and "cars operated on such interurban railroads" refer to and mean only such cars as shall be operated at regular intervals between said City of Columbus and some other city, or some village, at least ten miles distant from the limits of said City of Columbus, where such interurban cars enter the same. Any grant or traffic arrangement made by said The Columbus Railway Company to any other corporation, company or individual, to use any of its tracks or any part thereof, shall be subject to all rules and regulations of said City now in force, and all reasonable rules and regulations which may hereafter be adopted by said city, concerning the rate of speed and headway, and the operation, character, lighting and heating of all cars so operated under such grant or traffic arrangement for such joint use, and for the comfort and safety of passengers carried thereon.

92 Interurban Passenger and Freight Cars.

Sec. 14. Neither said The Columbus Railway Company nor any other person, company or corporation which may hereafter obtain the right to use any of its track or tracks, shall move along or over the same any passenger cars in trains of more than three cars per train, including the motor car.

Freight cars shall not be moved along or over the whole or any part of the tracks of the said The Columbus Railway Company in said City, except upon the streets and avenues or parts of streets and avenues hereafter designated by ordinances which may hereafter be passed by the City Council of said city granting such permission; provided, however, that said company may transport over any of its lines, material to be used by it in construction of repairs and extensions.

Conductors and Motormen—Duties.

Sec. 15. At all times when any car is in use a motorman in charge of such car shall be stationed on the front platform of the motor car; and there shall be a conductor on each car, whose duty it shall be to collect fares and to look out for the safety and comfort of passengers.

Electrolysis.

Sec. 16. In the construction of its trolley wires, said company shall safeguard the water pipes, and any other system of iron pipes which may be maintained by said city, by using what is known as the "double trolley system," or such other device, to be approved by the Board of Public Works, as shall effectually protect such pipes from injury by electrolysis.

To Expend a Million Dollars.

Sec. 17. Said company shall, as rapidly as the requirements of its railroad system and the efficient service of the public demands,
93 during the life of this grant, expend not less than $1,000,000.00 in extensions and betterments, and shall, at all times during the life of this franchise, furnish, upon all its lines, efficient and adequate service and a sufficient number of first class, commodious cars for the accommodation of its patrons. The City Council of said city may, by ordinance, require such reasonable extensions of such of the lines operated by said company as may be necessary for the efficient operation of such railroad and for the convenience of the public, whenever along the line of any such proposed extension and between parallel lines four hundred feet distant on each side thereof, there shall be when such extension is ordered, not less than one hundred and fifty separate dwellings, used and occupied as dwellings, per mile or in like proportion for any less distance; but said company shall not be required to construct more than one mile of extensions within one calendar year.

It is expressly provided that any and all franchise rights to operate extensions which may hereafter be granted to said company, shall expire at the expiration of said period of twenty-five years.

Grooved Rails and Kind of Pavement.

Sec. 18. In making extensions on paved streets, and in relaying tracks on paved streets, grooved or other modern and improved rails of weight and pattern to be approved by the Board of Public Works of said city shall be laid; such rails shall be laid upon foundations of concrete or other material, and according to plans to be approved by said Board.

Whenever any unpaved street, or any part of any street, along which said company operates lines of street railroad, shall hereafter be improved by laying down thereon a pavement, said company shall relay its tracks thereon in the manner aforesaid, and shall pave the portion of such street as provided in sections 4 and 5 of this ordinance.

94 Cash Deposits for City Repairs.

Sec. 19. Said Company shall keep on deposit with the said city at all times the sum of one thousand dollars as an emergency fund, against which the city may draw, upon vouchers drawn by the Director of Accounts, with the approval of the Board of Public Works, for the cost and expense of any repairs made by said city, which, by the terms of this ordinance, should have been made by said company, and which said company after due notice and reasonable opportunity has failed or neglected to make within the time prescribed by this ordinance; and said company shall at once replace any portion of said fund, expended as aforesaid so as to keep on deposit at all times the amount of one thousand dollars; and at the expiration of the time granted by this ordinance any sum remaining in said fund due to said company shall be refunded.

Perpetual Franchises.

Sec. 20. The grants and provisions hereinbefore made and contained for the renewal of the franchise of the said The Columbus Railway Company on the streets and avenues hereinbefore mentioned in section 1 of this ordinance, shall in all respects apply to the grants, rights, privileges and franchises of the predecessors in title of said The Columbus Railway Company, to construct, maintain and operate lines of street railway on Main Street, (formerly called Friend Street) from High Street to Rose Avenue; on State Street from High street to Grant avenue; thence in a northerly direction on Grant avenue to Oak street; thence on Oak street in an easterly direction to Sherman avenue, (formerly called Bruce street); on Long street from High street in an easterly direction to Mulberry street and thence in a southerly direction on Mulberry street from Long street to Broad street; on Cleveland avenue in a northerly direction from

Long street to Mt. Vernon avenue; thence in an easterly * * * direction on Mt. Vernon avenue to Washington avenue; on West * * * Broad street from High street to a point opposite the center of * * * the east driveway to the Central Hos-
95 pital for the Insane, (the same being the corporation line of the City of Columbus as established by ordinance of the City of Columbus, passed on or about May 18th, 1890); on Glenwood avenue in a southerly direction from Broad street to the Harrisburg pike; thence in a southwesterly direction on the Harrisburgh pike to Green Lawn cemetery; as fully as if the routes and streets and avenues mentioned in this section were specifically mentioned and included in the first section of this ordinance, if, and so far as, the franchises in the streets and avenues mentioned in this section or either of them or any part thereof shall hereafter be judicially declared by a court of competent jurisdiction, or by any appel-ate court to which any suit brought to test any or all of said franchises shall be brought, may be carried by proceedings in error or on appeal, not to be franchises in perpetuity.

It is expressly provided that nothing contained in this ordinance is intended, nor shall anything herein be construed to be, a concession by said City of Columbus of the validity of any claim of said company to perpetual franchises to operate lines of street railroad in all or any of the streets and parts of streets named in this section.

It is further expressly provided, that nothing contained in this ordinance shall be pleaded or considered to be a bar to any suit or suits which may hereafter be brought in any court or courts of competent jurisdiction, seeking to test the validity of any claim or claims to said company to perpetual franchises to operate any line or lines of street railroad upon any of the streets or parts of streets mentioned in this section.

## Fares and Transfers.

Sec. 21. Said The Columbus Railway Company, its successors and assigns, shall be entitled to charge fares within the corporate limits of said city during the term herein provided at the following rates, and no more, to-wit: For a single cash fare, 5 cents; for tick-
96 ets in packages of seven, twenty-five cents, until the annual gross receipts from all fares received on all lines operated by said company within said city amount in the aggregate to the sum of one million, seven hundred and fifty thousand dollars ($1,750,000.00); and after said annual receipts amount to said sum, for tickets in packages of eight, twenty-five cents, all of which tickets shall be good for use from the time the regular cars start in the morning until the regular cars quit running at or shortly after midnight; for single fares between the hours when regular cars quit running at or shortly after midnight until such cars commence running in the morning, during the first five years of the term granted by this ordinance, ten (10) cents, and thereafter five (5) cents.

No charge shall be made for children under six years of age at-

tended by parent or other person. Children over six years of age and under ten years of age shall be carried for 3 cents each.

Tickets for the rates required by this ordinance shall be kept on sale and sold at the principal office of said company in the City of Columbus during business hours and at all times by conductors on the regular cars of said company at the rates for tickets aforesaid. For each cash fare and for each ticket said company shall, on demand of the passenger tendering the same, issue to such passenger a transfer slip good for one continuous passage in said city on any other line of street railroad owned or operated by said company which connects with, diverges from, or crosses, the line on which said transfer was issued, if presented within fifteen minutes after the time designated by punch marks on transfer slip, which time so designated shall be a reasonable arriving time of car at any one of the transfer points of the line by which such transfer was issued.

For each five cent cash fare said company shall, on demand of the passenger tendering the same, issue to such passenger a transfer slip good for one continuous passage over any other line of electric railway now constructed or hereafter constructed or operated in said City, by any person, company or corporation, other than
97 The Columbus Railway Company, whose charges for transfer slips is not less than that of said The Columbus Railway Company, and whose line of railroad connects with, diverges from, or crosses any line of road of said The Columbus Railway Company; provided, that the company, corporation or person operating such other line as aforesaid shall be required by said city to accept said transfer slips for such passage, and to exchange transfers with said The Columbus Railway Company; and said The Columbus Railway Company shall be required to accept, from all passengers transferred from such lines of other roads, similar transfer slips good for continuous passage over its lines in said city, if presented in the time above provided; and the receipts from the passengers purchasing such transfer slips, so issued as aforesaid by said The Columbus Railway Company, and by any other person, company or corporation, operating lines which cross the same or connect therewith, shall be equally divided between the operators of said lines of railroad respectively.

No free transportation shall be furnished except to officers and employes of the said railroad company, and, when permitted by law, to policemen and firemen of said city wearing their official uniform.

## All Night Cars.

Sec. 22. Between the hours of 5:30 a. m. and 12 o'clock midnight cars shall be run at intervals not to exceed the following, viz: High Street, between north and south corporation lines, 10 minutes; Schiller street and High street, to north corporation line, 10 minutes; Long street, 6 minutes; Main and Neil avenue, 6 minutes; State and Oak streets, 7 minutes; Livingston avenue and Fourth street, 10 minutes; Leonard avenue and Camp Chase, 11 minutes; Mt. Vernon avenue and cemetery, 11 minutes; Central market line, 15 minutes;

Pennsylvania and Parsons avenue, 10 minutes. Between the hours of 12 o'clock midnight and 5:30 o'clock a. m., cars shall be run, starting at 1 o'clock a. m., and continuing until 5 o'clock
98 a. m., hourly upon High street, West Broad street, and on two lines to be hereafter designated by said city, running easterly from High street.

Expiration.

Sec. 23. Upon the expiration of the term of the renewal franchise herein granted said company shall, unless a further renewal be granted by said city, remove all its tracks, wires and other appliances from the streets and avenues of said city and leave the portion of each and every street occupied by its lines in good condition, corresponding in finish and material with the remainder of such streets and avenues.

Sec. 24. The terms "the city" and "said city" whenever used in this ordinance, unless the context clearly indicates a different intention, are intended and shall be construed to mean The City of Columbus, Ohio; and the terms "the company" and "said company" and "The Columbus Railway Company" whenever used in this ordinance unless the context clearly indicates a different intention, are intended and shall be construed to mean The Columbus Railway Company, its successors and assigns.

Sec. 25. If at any time in the future the laws of Ohio shall be so amended as to do away with the Board of Public Works as now constituted by law, then and in that event the powers and duties herein conferred upon and required of the Board of Public Works shall be performed by such city officer or board as shall, by law, be entrusted with the duties and powers now performed by such board. If in the future the laws shall be so amended as to do away with the Director of Accounts of said city as now constituted by law, then the powers and duties conferred upon the Director of Accounts under this ordinance shall be exercised by such officer of the city as shall by law succeed to his powers and duties.

99 Repeal and When in Effect.

Sec. 26. The provisions of any and all ordinances and resolutions, and parts of ordinances and resolutions, heretofore passed or adopted by the City Council of said city, which are inconsistent with the terms of this ordinance, are hereby repealed and rescinded.

Sec. 27. This ordinance shall take effect and be in force from and after its passage and legal publication, and the filing by said The Columbus Railway Company, with the City Clerk of said city, of its acceptance in writing of each and all of the terms, provisions and requirements of this ordinance; provided, however, that if said company shall fail to file such written acceptance within thirty days after the passage of this ordinance, then this ordinance shall be void and of no force and effect, but if said company shall be prevented from accepting the terms, provisions and requirements of this ordi-

nance by injunction or other judicial or legal process, or *of* its acceptance thereof shall be delayed or postponed in the manner or by the means aforesaid, said Company may accept the terms, provisions and requirements of said ordinance at any time within thirty days after the expiration of the period during which said acceptance shall have been prevented or delayed as aforesaid, in which event said acceptance shall have the same effect as if the same had been filed within thirty days after the passage of this ordinance.

Passed February 4, 1901.

JAMES J. THOMAS,
*President of the City Council.*

Approved by the Mayor, February 6, 1901.

Attest:
JOHN T. BARR, *City Clerk.*

100 EXHIBIT No. 2.

An Ordinance, No. 17802.

Granting permission to The Central Market Street Railway Company, its successors and assigns, to construct, operate and maintain a single or double track street railway, with necessary sidetracks, curves, turn-outs and switches in the following streets of the city of Columbus, Ohio, to-wit: Rich street, Fifth street, Donaldson street, Livingston avenue, Mohawk street, Reinhard Avenue, Jaeger street, Hanford street, Fourth street, Hosack street, Innis avenue and Parsons avenue to the south corporation line of said City of Columbus.

(City Record Book 11, Page 516.)

Whereas, Application has been made in writing to the Board of Public Works, and the City Council of the City of Columbus, Ohio, for a franchise to construct, operate and maintain a street railway upon Rich street, Fifth street, Donaldson street, Livingston avenue, Mohawk street, Reinhard avenue, Jaeger street, Hanford street, Fourth street, Hosack street, Innis avenue and Parsons avenue, to the south corporation line of the said city; and

Whereas, Notice of said application has been published according to law; and

Whereas, Bids have been advertised for and received by said city for the construction of a railroad upon said streets as required by law; and

Whereas, The Central Market Street Railway Company bid and agreed to carry passengers upon said proposed railroad along said route at a lower rate of fare than any other bidder; and

Whereas, The consent in writing of the owners of the majority of the feet front of the lots and lands fronting and abutting upon said parts of said streets has been obtained and filed with the Clerk

of said city for the construction, operation, and maintenance of said street railroad. Now, therefore,

Be it ordained by the City Council of the City of Columbus, Ohio, as follows, to-wit:

Section 1. That The Central Market Street Railway Company, its successors and assigns, be and is hereby granted permission and authorized to construct, operate and maintain a street rail-
101 way in and upon the following streets in the city of Columbus, Ohio, to-wit: In Rich street from Third street to Fifth street; in Fifth street from Rich street to Donaldson street; in and across Donaldson street and Livingston avenue to Mohawk street; in Mohawk street from Donaldson street and Livingston avenue to Reinhard avenue; in Reinhard avenue from Mohawk street to Jaeger street; in Jaeger street from Reinhard avenue to Hanford street; in Hanford street from Jaeger street to Fourth street; from Hanford street to the south corporation line of said city; in Hosack street from Fourth street to Parsons avenue; in Innis Avenue from Fourth street to Parsons avenue; in Parsons avenue from Innis avenue to the south corporation line of said city in accordance with the provisions of this ordinance; with permission to connect the track or tracks on said streets with each other, and with the track or tracks of The Columbus, London and Springfield Railway Company, and The Columbus, Buckeye Lake and Newark Traction Company at Rich and Third streets, by means of a curve or curves.

Sec. 2. Said grantee and assigns shall have the right to lay down a single or double track on the route described in section 1 of this ordinance, with switches and turn-outs, wherever switches and turn-outs may be necessary or convenient, and to connect said track or tracks by curve or curves with its other track or tracks, and with the tracks of the other intersecting standard gauge street railroads within the city limits of Columbus, Ohio.

A plan showing the location of such switches, tracks and turn-outs shall be submitted to the Board of Public Works of said city and approved by it, before the construction thereof.

Sec. 3. That said track shall be of a standard gauge of four feet and eight and one-half inches in width, and on paved streets the rails shall be standard patterns, grooved rails, not less than 70 pounds to the yard, to be approved by the Board of Public Works, and upon such foundation as said board shall direct. The space between the inner rails where the double tracks are laid shall not exceed
102 five feet, measured from rail to rail.

Sec. 4. Said grantee, its successors and assigns, shall keep in repair all that portion of said streets and avenues which is included within lines drawn one (1) foot outside of the outer rails of its said tracks; and shall pay for the cleaning, sweeping and sprinkling of said portion of the public way occupied by it, and one foot on the outside of its outer rails, at the rate and in the same manner required of the abutting property owners for the residue of the public ways adjacent to the said strip. If the City Council at any time orders the improvement of the roadway of any of said

streets, avenues or alleys by laying down thereon a pavement of any kind, or a macadam roadway, said company shall, at its own expense, improve that portion occupied by the tracks of said road and one foot outside thereof with the same character of material as is used on the remainder of the street, and shall relay its or their tracks on any street or streets so paved with grooved rails on foundations as specified in section 3 hereof; or if on any of the said streets or avenues a pavement has already been laid, and an assessment therefor placed on the tax duplicate, said company shall pay to the Director of Accounts of the City of Columbus, Ohio, a proportion of the present value of the pavement covered by the assessment for said improvement as the space occupied by said tracks and one foot on the outside of the outer rails thereof bears to the entire width of the improved roadway. Such sum to be by the Director of Accounts paid to the City Treasurer, and by him to be credited to any portion of the assessment made for the cost of such improvement, remaining due from and unpaid by, the several abutting property owners. Provided, that if in any case the amount so paid shall exceed the unpaid assessments, the excess shall be by the Director of Accounts paid to the abutting property owner entitled thereto. The present value of the street paving referred to in this section to be determined by the Board of Public Works in consultation with the officers of said railway company, and in case a satisfactory price cannot
103 be agreed upon the matter is to be settled by arbitration according to the provisions of the Revised Statutes of Ohio.

Sec. 5. The pavement provided for in this ordinance shall be laid at such height of grade as may be fixed or determined by the Board of Public Works, and shall, during the existence of this ordinance, or grant, or any extension, amendment, or renewal thereof, be kept in repair under the direction, or under the supervision and direction of such officers as may be from time to time vested by law, or ordinance of the City Council, with the control and supervision of the public highways and works of the city, and on the failure of the company to make said repairs within thirty (30) days after receiving notice so to do from the Board of Public Works, the said board may make the same, or cause the same to be done, and the said City of Columbus shall collect all the cost and expense thereof from said company and the entire amount of such cost and expense shall constitute a lien and charge upon the property and franchise of said company, the same as if formally levied and assessed as in the case of other municipal improvements. That whenever the said railway is being put down on any unimproved street or streets said grantee and assigns shall grade the street from curb to curb at its own expense, and on a level with its tracks.

Sec. 6. Said grantee and its assigns shall at all times hereafter defend, keep harmless and indemnify the City of Columbus from any and all damages, lawful claims, and demands for injuries to persons or property, cost and expenses to which said city may be subjected or made liable by any proceedings at law or in equity growing out of the grant of the privileges in this ordinance granted, or out of the exercise or enjoyment of the same by said grantee and

its assigns, or out of the failure of said grantee and assigns, to construct or keep in repair the pavement or other improvements by them herein required to be constructed and maintained; and said grantee or its assigns may, at its own cost, defend against such action, either in its own name or in the name of the City of Columbus.

Sec. 7. The said City of Columbus shall have the right to
104 remove or obstruct, or authorize the same to be done, any portion of said railroad track wherever it shall be necessary in laying down or repairing water pipes, gas pipes, sewers, drains, gutters or cisterns or by hose or any other apparatus necessary to be used in extinguishing fire, or any other public work or improvement required to be done by said city, not disturbing the running of cars where it can be avoided, without incurring any liability for damage to said grantee.

Sec. 8. The said City of Columbus shall not be liable in any way to said grantee or its assigns, for damages it may sustain from the breaking or overflow of water from any sewer or drain, or from the breaking of any water pipe or gas pipe, or by reason of any change in the grade of said streets, and said grantee and assigns shall so construct the track as to fully protect from damage thereby any and all sewers, water pipes and mains, gas or other pipes running beneath the surface of the streets. Whenever the surface drainage of any street (whether improved or unimproved) be obstructed by the laying of said track the said grantee or its assigns shall construct all catch basins and pipe lead-offs, or relay so much of the paved roadway of said street at its or their expense, as in the opinion of the said Board of Public Works may be necessary to overcome the effects of such obstruction.

Sec. 9. In case it becomes necessary for said grantee and its assigns to remove the snow and ice from the tracks on said streets, it shall not be left in such a manner as to interfere with or impede travel or render the streets dangerous.

Sec. 10. The conductors, drivers or motormen of cars shall not allow any woman or child to enter or leave any car while in motion, and shall keep vigilant watch for all teams, carriages, persons and obstructions upon or near the track, and upon the first appearance of danger thereto, shall give warning and stop the car, if necessary, to prevent accident, and either the driver, conductor or motorman must always be on the front platform while the car is in motion.

Sec. 11. No car shall be run at a greater rate of speed than twelve miles an hour. Cars driven in the same direction shall not
105 approach nearer to each other than one hundred feet, unless from unavoidable necessity, or on switches or turn-outs. Said grantee and assigns shall at all times conform to such general rules and regulations as may from time to time be made by the council as to the rate of speed it may run its cars, and while the cars of said grantee and assigns are in motion or about to start, warning shall be given by bell or otherwise, to notify persons of any immediate or approaching danger.

Sec. 12. Permission is hereby given said grantee and its assigns to operate its entire line of street railway with any and all extensions

that may hereafter be made thereto, by electricity or other motive power, other than animal or steam power, as shall be acceptable to the city for such purposes. Said grantee and its assigns shall have the right to erect and maintain iron or wood poles, painted and neat in appearance, wires, fixtures and conduits, and any and all other appliances or appurtenances that in the opinion of said city shall be found necessary. At and after dark, all cars running shall be lighted and provided with suitable signal lights, and cars shall be kept clean, and when the temperature is below 35 degrees, Fahrenheit, shall be heated. No car shall be allowed to remain standing upon the line of said route for passengers or any other purpose, so as to impede any other vehicle, but shall be subject to such police regulations as are, or may be, prescribed for other vehicles, so far as they may be applicable. No car or cars shall be used on such railroad if so worn, broken or constructed, or kept in such condition as to imperil the lives, limbs or health of the passengers; provided, that if at any time during the life of this grant or any extension thereof said city shall require by ordinance all trolley wires or other electric wires in the principal business district of said city to be placed in conduits under ground, said grantee and its assigns shall within a reasonable time after the passage of such ordinance, and which time shall be fixed by said city, place all its trolley and feed wires within said district under ground. In the construction of its system of trolley wires said company and its assigns shall guard against injury to the water and other pipes of said city from electrolysis by
106 the use of what is known as the "double trolley system," or such other device as may be approved by the Board of Public Works for that purpose.

Sec. 13. In the erection and placing of wires or conduits and in the use of any and all other appliances or appurtenances found necessary to operate its line, a plan of the same, showing all poles, wires and other appliances or appurtenances that said grantee and its assigns shall desire to use, shall be submitted to and approved by the Board of Public Works. Said city shall have the right to fix the height of all wires and poles above the street, the size and location of all conduits in the street, and the distance at which poles shall be apart, and to regulate the places within the street where any and all tracks, appliances and appurtenances shall be located and to establish such regulations with reference to public safety and protection as the said city shall from time to time deem necessary and proper.

Sec. 14. Cars shall be run by said grantee, and its assigns, at no longer intervals than fifteen minutes, unless prevented by unavoidable casualty, and shall be operated regularly between 8 a. m. and 10 p. m. on Sundays, and between 5:30 a. m. and 11:30 p. m. on all other days; and said grantee and its assigns shall not run a train of more than three cars, including the motor, on any of its lines in said city.

Sec. 15. The Central Market Street Railway Company, and its assigns, shall be entitled to charge fares as follows, and no more: For Single fare within the corporate limits of said city, five cents; for seven tickets, twenty-five cents. No charge to be made for children under six years of age, attended by parents or other person in

charge of them. Children over six and under twelve years of age shall pay three cent fares. For each five cent fare said company and its assigns, shall on demand, at the time of payment of said fare, issue a transfer slip good for continuous passage within said city, over any line of railway connecting with or intersecting its line of railway, now or hereafter built, if presented within twenty minutes after leaving the car of the issuing company, providing said transferee lines be required by said city to accept such transfer slip for such passage. And the said The Central Market
107 Street Railway Company, and its assigns, shall be required to accept from any such connecting or intersecting line, similar transfer slips, which shall be good for immediate continuous passage over its line within said City of Columbus. The fares paid, for which such transfers are issued, shall be divided equally between the operators of the two connecting or intersecting lines of railways over which said fares are paid.

Sec. 16. Said grantee and its assigns, shall have the right to carry passengers, United States mail, packages, express matter, baggage, and freight, on its said lines in said City of Columbus, but shall not have the right to move along its lines within the business district of said city any steam railroad freight or passenger cars, and all cars of said company and its assigns carrying packages, express matter, baggage and freight, shall be loaded and unloaded in a depot or a place to be hereafter designated by said company and its assigns on lands abutting on its said line, and shall have the right and permission to put in proper curves, switches and tracks on said streets and avenues from its said lines to its said depot across the sidewalk in front thereof to said depot at any point along its said line in said City of Columbus. Said company or its assigns may select for its use in loading, unloading and storing all kinds of freight and its cars, except live stock, and shall have the like right and permission to put in proper curves, switches and tracks on said streets and avenues from its said lines to said depot across the sidewalk in front thereof, at any point along its said lines in the said City of Columbus.

Sec. 17. Said the Central Market Street Railway Company, or its assigns, shall have the right to connect its lines with the standard gauge loop in the central portion of said city, and shall have the right and permission to use and occupy said loop under the terms and conditions contained in section 15 of ordinance No. 16,676, passed by the Council of the City of Columbus, on the 23rd day of April, 1900, except that said company and its assigns shall only be required to run its said passenger cars over said loop, as required by this ordinance over its other lines within said city, and all the lines of said company and its assigns in said city shall be subject
108 to all provisions contained in said section fifteen (15) of said ordinance No. 16,676 aforesaid.

Sec. 18. As a consideration for the grants herein made the said The Central Market Street Railway Company and its assigns shall pay to the City of Columbus the following per cent. upon the gross receipts of said company for local passengers fares received within said City of Columbus, towit: Two per cent. of said fares, during

the term of said franchise, provided that by "local fares" is meant only those fares for passengers transported entirely within the limits of said city, and does not include any part of fares for passengers carried partly within and partly without said limits. Said payments shall be made annually at the beginning of each calendar year for the amounts earned during the preceding year, accompanied by a statement of the gross receipts during said period from local fares, duly verified by the proper officer of said company and filed with the Director of Accounts.

The Director of Accounts of said city, within 30 days immediately following the time of said payment, shall have access during business hours, to the books of said grantee or assigns for the sole purpose of ascertaining the amount of local fares received by said grantee or its assigns for carrying said passengers within said city limits during such preceding year. Provided, however, that, if at the beginning of any calendar year the said The Central Market Street Railway Company, and its assigns, shall notify said City of Columbus that it will, and shall thereafter sell tickets good for one passage upon its road in Columbus, Ohio, at the rate of eight tickets for 25 cts. and 33 tickets for one dollar, then said railway company shall be relieved from the further annual payments to said city under this section so long as it shall continue to sell tickets at such reduced rates.

Sec. 19. This grant is made and shall continue in force for the full period of twenty-five (25) years from and after the 23rd day of April, 1900, and all franchises and grants to said grantee and its assigns for extensions of lines, turn-outs, switches, connections or additional lines of street railway connected with, or to be con-
109 nected with the lines of street railway of said grantee and its assigns, authorized and permitted under this ordinance, shall be considered a part of the system of street railway hereby authorized, and shall expire and wholly terminate with the expiration of the franchise and grant authorized under the terms of this ordinance.

Sec. 20. This grant is made upon the condition that said railroad shall be constructed and ready for operation within said City of Columbus within two years from the passage of this ordinance, and if not constructed and in operation within said time the grant herein and all rights thereunder shall thereupon, and without any action on the part of said city, cease and determine. Provided, that if said grantee and its assigns be delayed in the construction by injunction or other proceedings in court over which it has no control, the time it is so delayed by such proceedings shall not be counted as a part of the period within which said railway is to be constructed and made ready for operation, but said period for such construction and putting in readiness for operation shall be extended by adding to the period of two years aforesaid the length of time said company is so delayed by said causes.

Sec. 21. Upon the expiration of the term of twenty-five (25) years, provided by this ordinance, unless such grant has been renewed or extended by said city, the City of Columbus shall have the

right by giving two years' notice in writing, before the expiration of said term of twenty-five years, of its intention so to do, to purchase of the said grantee and its assigns so much of its lines of railway as then lies within the city at a purchase price to be fixed by three disinterested men, one of whom shall be selected by the city, one by said grantee or its assigns, and the third by the two so chosen; provided, that if said city shall not elect to purchase said portion of said railway or shall not renew or extend said grant, then said grantee and its assigns shall within eight months from the expiration of said time remove the tracks, wires, poles and conduits and other properties from the streets so occupied by it, and shall leave the portions of the streets so occupied by them in good con-
110 dition and repair. And if said city elects to make said purchase the price fixed therefor shall be paid the said grantee or its assigns in cash before taking possession of said part of said railway, and within sixty days after said price is so fixed by said arbitrators; and in default of such payment within said time said option to cease and determine.

Sec. 22. The said city hereby reserves the full right and power to grant to any other company, corporation or individual, the right to jointly use all or any part or parts of said tracks with said The Central Market Street Railway Company and its assigns, and with each other upon equitable terms of payment to said The Central Market Street Railway Company, and its assigns, taking into consideration the value, cost of construction, amounts paid and repaid for street paving and other street improvements and the maintenance of the tracks so used and of the power used for operation. In the event said terms cannot be agreed upon by said owning, succeeding or assignee company, and the party applying for said joint use within sixty days after application therefor following a grant for such joint use by said city, said terms shall be submitted to arbitration, one arbitrator to be chosen by said owner, successor or assignee, one by the party desiring to jointly use said tracks, and these two so selected to select the third arbitrator. The decision of said arbitrators in the absence of fraud, accident or mistake of law or fact, to be final and conclusive on both parties. But said City of Columbus reserves the right to fix and determine by ordinance the rules and regulations governing such joint use and occupation. Provided, that neither the arbitration herein mentioned nor any appeal therefrom, shall in any manner delay the joint use and occupation by any person, firm or corporation, which shall receive a grant thereof as aforesaid, with The Central Market Street Railway Company, under such rules and regulations as shall have been fixed by said city as aforesaid. Provided, further, that said The Central Market Street Railway Company and its assigns, shall not have the right to grant to any other company, corporation or individual, permission to use any portion of its said tracks with- said city without such permission
111 having first been given by said city.

Sec. 23. The said city also reserves the right to grant to any other company, corporation or individual, permission to lay, on that part of Parsons avenue covered by this grant, at its or their own

expense, any additional rail or rails, to be used by such company, corporation or individual in connection with the rail or rails, ties and roadbed of The Central Market Street Railway Company; the use thereof and the compensation to be paid to said The Central Market Street Railway Company and its assigns, for such use to be arrived at and determined by arbitration in the manner and with like effect as provided by section 22 of this ordinance. Provided, that the laying of such additional rail or rails shall be under the supervision and subject to the approval, of the Board of Public Works of said city.

Sec 24. The terms "The Central Market Street Railway Company," "said company," "The grantee," and "The company," wherever used in this ordinance, unless the connection clearly indicates a different intention, is intended, and shall be construed, to mean "The Central Market Street Railway Company and its assigns."

Wherever in this ordinance the term "the City of Columbus," "the city," or "said city" is used, said terms, unless the connection clearly indicates a different intention, is intended, and shall be construed, to mean "the City of Columbus, Ohio."

Sec. 25. This ordinance shall take effect and be in force from and after its passage and legal publication and the filing with the City Clerk of said city by said company of a written acceptance of its terms and conditions, and the payment *of* said company of the cost of publication of this ordinance.

JAMES J. THOMAS,
*President of the City Council.*

Passed January 21, 1901.

Approved by the Mayor, January 22, 1901.
Attest:
JOHN T. BARR,
*City Clerk.*

112 EXHIBIT No. 3.

Columbus, Ohio.

August 20, 1918.

To the City of Columbus, Ohio; George J. Karb, Mayor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Arthur P. Lammeck, Joseph C. Nailor, Edgar L. Weinland, and Fred P. Zimpfer, Members of the City Council of said City, City Hall, Columbus, Ohio:

The Columbus Railway, Power and Light Company, hereinafter referred to as This Company, has for sometime past been operating its street railway lines in the City of Columbus under two certain franchises granted by said city, the first to The Columbus Railway Company for a term of twenty-five years by ordinance approved February 6, 1901, sometimes called and hereinafter referred to as the

Blanket Franchise, duly transferred and conveyed by that company to this company by deed dated January 29, 1914, and the second to The Central Market Street Railway Company for twenty-five years by ordinance approved January 22, 1901, hereinafter referred to as the Central Market Franchise, duly conveyed, after foreclosure proceedings, to this company by deed dated March 1, 1907.

This company is the owner of certain other franchises previously granted to predecessors in title of The Columbus Railway Company but duly transferred and conveyed by said company to this company by the deed aforesaid of January 29, 1914, which said franchises were granted without limitation of time and are perpetual. The streets covered by these perpetual franchises are set forth in Section 20 of said Blanket Franchise ordinance under the heading "Perpetual Franchises." Said section reads as follows:

"The grants and provisions hereinbefore made and contained for the renewal of the franchise of the said The Columbus Railway Company on the streets and avenues hereinbefore mentioned in section 1 of this ordinance, shall in all respects apply to the grants, rights, privileges and franchises of the predecessors in title of said The Columbus Railway Company, to construct, maintain and operate lines of street railway on Main street, (formerly called Friend street) from High street to Rose avenue; on State street from High street to Grant avenue; thence in a northerly direction on Grant
113 avenue to Oak street; thence on Oak street in an easterly direction to Sherman avenue, (formerly called Bruce street); on Long street from High street in an easterly direction to Mulberry street, and thence in a southerly direction on Mulberry street from Long street to Broad street; on Cleveland avenue in a northerly direction from Long street to Mt. Vernon avenue; thence in an easterly direction on Mt. Vernon avenue to Washington avenue; on West Broad street from High street to a point opposite the center of the east driveway to the Central Hospital for the Insane, (the same being the corporation line of the City of Columbus as established by ordinance of the City of Columbus, passed on or about May 18th, 1890); on Glenwood avenue in a southerly direction from Broad street to the Harrisburg pike; thence in a southwesterly direction on the Harrisburg pike to Green Lawn cemetery; as fully as if the routes and streets and avenues mentioned in this section were specifically mentioned and included in the first section of this ordinance, if, and so far as, the franchises in the streets and avenues mentioned in this section or either of them or any part thereof shall hereafter be judicially declared by a court of competent jurisdiction, or by any appellate court to which any suit brought to test any or all of said franchises shall be brought, may be carried by proceedings in error or on appeal, not to be franchises in perpetuity.

"It is expressly provided that nothing contained in this ordinance is intended, nor shall anything herein be construed to be, a concession by said City of Columbus of the validity of any claim of said company to perpetual franchises to operate lines of street railroad in all or any of the streets and parts of streets named in this section.

"It is further expressly provided, that nothing contained in this

ordinance shall be pleaded or considered to be a bar to any suit or suits which may hereafter be brought in any court or courts of competent jurisdiction, seeking to test the validity of any claim or claims *to* said company to perpetual franchises to operate any line or lines of street railroad upon any of the streets or parts of streets mentioned in this section."

Under the provisions of the Blanket Franchise and the Central Market Franchise, this company has for a number of years been issuing and selling eight tickets for twenty-five cents and giving universal free transfers thereon, which represents a lower street railway fare than is in force in any city in the United States and is under present circumstances non-compensatory and confiscatory.

The street railway property of this company is worth more than twelve millions of dollars on any reasonable basis of investment or physical value. The bonds outstanding fairly chargeable against the street railway property amount to $7,225,000., on which the annual interest charge amounts to over $333,000. Under the law,
114 this company is entitled to earn from the operation of its street railway lines a fair return upon the value of the property which it employs in furnishing street railway service to the people of the City of Columbus.

Recently, the operating expenses of this company, as of all other street railway companies, have greatly increased, owing to the increased and increasing cost of all materials and supplies, in many instances more than one hundred per cent., and to the higher wages that all such companies have been required to pay to their employes. The taxes and necessary replacement and other depreciation charges have also materially increased. Take, for example, the coal bill; in the year 1915, this company paid for coal required to operate its street railway lines the sum of $60,164; the bill, in the year 1916, was the sum of $81,354.; and, in the year 1917, the bill had increased to the sum of $234,838. Also, the wage account of the railway employes of this company, in the year 1916, amounted to the sum of $806,336.; but, in the year 1917, it had increased to the sum of $887,994. These large increases in operating and maintenance expenses have resulted in corresponding decreases in the net earnings of this company. Its street railway net earnings for the twelve months ending June 30, 1918, after deducting operating expenses and taxes and setting aside a proper amount to represent depreciation, were only the sum of $301,987, which was not enough to pay the interest on the bonds outstanding properly chargeable against the street railway property of this company.

In the month of June, 1918, railway employes of this company demanded higher wages, and, after some negotiations, the controversy was submitted for arbitration to the National War Labor Board. By the decision of that Board, rendered July 31, 1918, the wages of the railway employes of this company were increased over fifty per cent., resulting in an increase of more than $560,000. over the highest amount ever paid by this company to its railway employes in any one year. With this increase, the wages required to be paid

by this company to its railway employes will be more than $1,500,000. per year.

115 It will thus be seen, that, although this company was not earning a fair return on its street railway property prior to the wage increase fixed by the National War Labor Board, the added burden of the Board's wage award will result in leaving this company without any net earnings whatever. In fact, its gross earnings will fall short by more than $250,000 of meeting its operating expenses, without allowing anything whatever for interest on its bonds, which interest must be paid.

This company is a public utility upon which the law imposes certain duties and obligations, including the duty of maintaining its property in good order and repair, so that it may render adequate and satisfactory service to the public. This company can not do this unless it receives sufficient revenue from the operation of its cars, which means that the rates must be adequate. The rates prescribed in those two franchise ordinances are inadequate and confiscatory, and all rights of the city and of the public thereunder are and must be subject and subordinate to the provisions of the Fourteenth Amendment to the Constitution of the United States prohibiting the State or any municipality therein from depriving this company of its property without due process of law, that is, in the present case, from forcing upon this company inadequate and confiscatory rates of fare.

On February 25, 1918, this company, appreciating the situation then existing, requested in writing the city council of the City of Columbus to authorize this company to charge higher rates, but this request was summarily refused. A later request for relief was also refused, notwithstanding the belief expressed by the Mayor and some members of the City Council that relief should be granted.

Increased revenue and proper compensation for service rendered are necessary in order that this company may continue to perform its public duties. And this fact was recognized by the National War Labor Board, which in its award granting large increases in the wages of this company's railway employes, said:

116 "This increase in wages will add substantially to the operating cost of the company and will require a reconsideration by the proper regulating authority of the fares which the company is allowed by law to collect from its passengers. We make part of this award the words we have used in the award in the Cleveland case: We have recommended to the President that special congressional legislation be enacted to enable some executive agency of the Federal Government to consider the very perilous financial condition of this and other electric street railways of the country, and raise fares in each case in which the circumstances require it. We believe it to be a war necessity justifying Federal interference. Should this be deemed unwise, however, we urge upon the local authorities and the people of the locality the pressing need for such an increase adequate to meet the added cost of operation."

And again that Board in its award said:

"In justice the public should pay an adequate war compensation for a service which can not be rendered except for war prices. The credit of these companies in floating bonds is gone. Their ability to borrow on short notes is most limited. In the face of added expenses which this and other awards of needed and fair compensation to the employes will involve, such credit will completely disappear. Bankruptcy, receiverships and demoralization, with failure of service must be the result. Hence our urgent recommendation on this head."

This company must now refuse to continue the plan of issuing and selling eight tickets for twenty-five cents with universal free transfers, and now hereby surrenders, relinquishes and cancels the aforesaid Blanket Franchise and the aforesaid Central Market Franchise, and it will no longer operate its cars thereunder. It will hereafter consider and hold itself a tenant at sufferance in those streets which are not covered by its perpetual franchises, and it will withdraw from those streets whenever the city notifies it to do so. In order to give street railway service to the people of the City of Columbus, this company will continue to operate its street railway lines, but not under said two franchises or either of them, upon all of the streets of the city until notified by it to withdraw from those streets not covered by the aforesaid perpetual franchises.

This company does hereby give further notice to the City that it will at once discontinue the sale of eight tickets for twenty-five cents and the giving of universal free transfers and that it will hereafter charge five cents for a single ride and one cent for each transfer, transfer slips to be used at designated transfer points. In regard to the tickets heretofore sold and now outstanding in the hands
117 of the public, this company will accept and honor them as heretofore.

Respectfully submitted by order of the Board of Directors.

THE COLUMBUS RAILWAY,
POWER & LIGHT COMPANY.
By S. G. McMEEN, *President*.

And afterwards, to-wit: on the 21st day of September, A. D. 1918, there was filed in the Clerk's Office of said Court in said cause, a certain Opinion of Judge Westenhaver, which said Opinion is clothed in the words and figures following, to-wit:

118 *Opinion of Judge Westenhaver.*

In the United States District Court, Southern District of Ohio, Eastern Division.

In Equity.

No. 104.

THE COLUMBUS RAILWAY, POWER & LIGHT COMPANY, Complainant,

vs.

THE CITY OF COLUMBUS, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred P. Zimpfer, Members of the City Council of said City, Defendants.

Opinion.

WESTENHAVER, *District Judge:*

This cause has been heard and submitted on complai-ant's application for a preliminary injunction based on its verified bill and affidavits, and on defendants' motion to dismiss for want of jurisdiction and because a valid cause of action in equity is not stated. These respective motions have been elaborately argued both orally and by briefs. Due consideration has been given to the many authorities cited and the several contentions made, but this opinion will deal only with such as seem to me vital and controlling.

The complainant is a corporation organized under the laws of the state of Ohio. The defendant, the city of Columbus, is a municipal corporation of the state of Ohio, and the other defendants are its mayor, members of its council and other city officials. Complainant owns and operates a system of street railways within the city of Columbus and is engaged in manufacturing and selling heat, light, and power to the inhabitants of the city and the industrial plants therein and adjacent thereto.

Complainant's street railways lines have been constructed, maintained and operated by virtue of certain grants or fran-
119 chises. Those are embodied in two ordinances duly enacted by the proper authority of the city of Columbus. The principal franchise, called the Blanket franchise, is ordinance No. 17801, passed February 4, 1901; and the other, called the Central Market franchise, is ordinance No. 17802, passed January 21, 1901. In addition, complainant claims to own a perpetual franchise on certain streets, but the provisions thereof are not material to any question now to be decided. Both franchises are for terms of twenty-five years and will not expire, by their terms, earlier than the year 1926,

They require the grantee to carry passengers for a single cash fare of five cents and to sell tickets in packages of eight for twenty-five cents, and to give universal free transfers upon the payment of a five cent fare or the presentation of one of these tickets.

Complainant's bill alleges and the supporting affidavits clearly show that the cost of operating these street railway lines has greatly increased during the present war, owing to the rise in price of coal, material, supplies and labor. As a result of this increased cost the net earnings from the operation of the street railway line for the year ending June 30, 1918, after deducting taxes, operating expenses and a proper charge for depreciation, were only $301,987.00. These earnings are insufficient by the sum of $31,000.00 to pay interest on outstanding bonds, and are sufficient to allow a net return of only 4⅛ per cent on the actual value of the capital invested in the street railway system. The value of this property, it is alleged, is $12,000,000.00, and the par value of the bonds issued and outstanding is $7,225,000.00.

In June 1918 complainant's street railway employes demanded an increase in wages and, in order to avoid a strike, the controversy between the complainant and its employes was submitted to the National War Labor Board for decision. This board on July 31, 1918, made an award granting to the employes an average increase of 50 per cent in the rate of wages hitherto being paid. Com-
120 plainant abided by this decision and granted the increase thus awarded. The amount of this increase, it is estimated, will be for the ensuing year $560,000.00, and as a result thereof, it is estimated that the gross earnings will fall short of paying operating expenses, taxes and a proper allowance for depreciation by approximately $250,000.00. This leaves no net income either to pay interest on outstanding bonds or dividends on capital actually invested.

Complainant alleges that these facts were twice brought to the attention of the city council of defendant, and request made for permission to increase the rate of fare above that fixed by those franchise grants so as to permit the earning of a reasonable return on the invested capital. This request being either denied or ignored, complainant on August 20, 1918, filed with defendants a communication in writing stating that it would henceforth discontinue the selling of eight tickets for twenty-five cents, and the giving of universal transfers, and that it surrendered, relinquished and cancelled its two franchises; that it would no longer operate cars thereunder; that it would thereafter consider itself a tenant by sufferance only on the streets, and would withdraw therefrom whenever notified so to do by the city, but that until so notified, and in order not to deprive the traveling public of service, it would continue to operate its lines, not under those franchises or either of them, but at a rate of fare to be fixed by itself. It thereupon fixed the rate at five cents for each fare and made a charge of one cent for each transfer to be issued, discontinuing the sale of eight tickets for a quarter and free transfers. This rate thus established has been in force since August 20, 1918.

On the same day as this communication in writing was filed the

bill herein was also filed. This bill, as well as the amended bill filed September 3, 1918, states that the defendants threaten and will, unless restrained, attempt to force complainant to continue to operate these street railway lines in accordance with the terms
121 of these two franchise grants. The nature of the threats made and the means to which it is expected the city will resort to enforce its threats are not stated or shown.

Complainant's bill also alleges and shows that in addition to its street railway business it is engaged in manufacturing and selling electricity for heat, light and power. The capital invested therein, the earnings thereof and the franchise rights are not disclosed. The city of Columbus and its suburbs, it is alleged, contain a population of more than 250,000; that it is a large industrial manufacturing center in which are situated shops, factories and plants; that many of these persons and plants are employed in the making of various kinds of munitions and war materials necessary to the prosecution of the war; that within the territory served by complainant's street railway lines and by its heat, light and power is located a military barracks in which are quartered more than 100,000 recruits per annum. All these it is said are dependent upon the street railway service and on the heat, light and power furnished by complainant. The discontinuance or impairment of this service would cause great harm to the Government of the United States, to the people of the city of Columbus and to all persons dependent thereon.

Complainant's amended bill alleges and the supporting affidavits show that it has in progress a plan to enlarge its heat, light and power business and that it is necessary to buy and install new equipment for this purpose, and that in order so to do, it is necessary to raise new capital which it is unable to do because of the low rates of fare fixed for street railway service.

Such in substance and in brief is the case made upon which the jurisdiction of this court is involved and a preliminary injunction is asked. Complainant urges that any action of the city or its officials compelling the continuance of street railway service on the terms of these franchises at less than cost, or at a loss is depriving it of its property without due process of law in violation of the
122 due process clause of the Fourteenth Amendment. This position is supported by two lines of argument. One is that the fare provisions of these franchises amount only to a legislative fixing of a rate of fare for transportation service, and cannot be enforced when conditions have so changed that this rate of fare does not yield a fair return on the capital actually invested. Another is that even if these franchises were mutually binding contracts when entered into, they are no longer enforcible because of the conditions produced by a state of war. From these positions it is argued that complainant has the right to treat these franchise conditions as terminated, and having, by its communication in writing to the city, so declared, it becomes and is thereafter a tenant by sufferance only in the streets, subject to objection at will by the city, but that while the city refrains from so ejecting it and permits street railway service to be given, complainant has the right to insist upon a rate of fare which will yield a fair return on the capital actually in-

vested, and that any effort of the city to compel service on terms which will deprive it of this fair return is depriving complainant of its property without due process of law. It is of course, insisted that the five cent straight fare with a charge of one cent for transfer is the rate necessary to yield that fair return on the capital actually invested, and is, therefore, a reasonable rate.

Defendants urge that the averments of the bill do not present a real and colorable, but only a fictitious and fraudulent federal question under due process of law clause of the Fourteenth Amendment; and that, therefore, inasmuch as there is no diversity of citizenship this bill should be dismissed for want of jurisdiction; and further that the bill does not state a valid cause of action in equity such as entitles complainant to any relief.

The primary and controlling question, in my opinion, depends on the nature of the relation created between the complainant and the city by these franchise grants. This relation is settled beyond controversy by numerous decisions of the Supreme Court of
123 Ohio and of the Supreme Court of the United States. The statute law of Ohio in force when these ordinances were passed were sections 2501, 2502, 2505, 2505*b*, 3443, 3443-12, Bates Annotated Statutes of Ohio. They are copied in full in the margin, 194 U. S. 531-34. These sections slightly different only in phraseology, are now sections 3768 to 3777 and 9101 to 9139 of the Ohio General Code. Cases construing these sections and defining the rights are burdens created by franchise ordinances, such as are now under consideration, are the following: Railway Co. vs. Village of Carthage, 36 O. S. 631, 634; City of Columbus vs. Street Railroad
(45)
Company, 46 O. S. 98; Interurban Company vs. Cincinnati, 93 O. S. 109; Cleveland vs. Cleveland City Railway Company, 194 U. S. 517; Cleveland vs. Cleveland Electric Railway Company, 201 U. S. 529; Cleveland Electric Railway Company vs. Cleveland, 204 U. S. 116.

The holding of all these cases is uniform. Of them the leading one is Cleveland vs. Cleveland City Railway Company, 194 U. S. 517. The law as settled by these cases is that the legislature has by these sections delegated to municipal corporations full power and authority to enter into binding contracts for the maintenance and operation of street railway lines; that whatever the city in fact does pursuant thereto is the act of the state and is mutually binding upon the parties. Franchise grants for fixed terms not exceeding twenty-five years, and for a fixed rate of fare to continue during the term of such grants may lawfully be made by the city under this legislative delegation of power. If the city passes an ordinance purporting to grant a franchise for a fixed term with a rate of fare to endure during that term, and this ordinance is accepted expressly or impliedly, a contract is engendered mutually binding and unalterable, except by the consent of both parties, during the term thereof.

In Cleveland vs. Cleveland City Railway Company, 194 U. S. 517 all these rules are fully stated and upheld. The ques-
124 tion there was whether or not the ordinances under consideration had in fact created a contract at a fixed rate of fare for

a definite term, thereby extinguishing a right reserved to the city in earlier ordinances of increasing or diminishing the rate of fare. Mr. Justice White, delivering the opinion says (p. 536):

"In reason, the conclusion that contracts were engendered, would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time and no reservation was made of a right to alter, that by these ordinances existing rights of the corporations were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, and the fact that a written acceptance by the corporations of the ordinances was required, we can see no escape from the conclusion, that the ordinances were intended to be agreements binding upon both parties definitely fixing the rates of fare which might be thereafter charged. Taking all the circumstances above referred to into account, the case before us clearly falls within the rule as to the binding character of agreements respecting rates applied in Detroit vs. Detroit Citizens' Street Railway Company, 184 U. S. 368, and approvingly referred to in Knoxville Water Co. vs. Knoxville, 189 U. S. 434, 437."

The other cases are equally in point, and, inasmuch as no conflict exists therein, a review of them is unnecessary. Numerous cases illustrating and applying the same rule are contained in the United States Supreme Court Reports arising under municipal ordinances of other states. A citation of them is for the same reasons superfluous.

Complainant's further contention that the fare provision of these franchises is only a legislative regulation of the charge for service is also shown by these authorities to be untenable. There are cited, in support of this contention, Milwaukee Electric Railway Company vs. Wisconsin Railroad Commission, 238 U. S. 174, and other kindred cases. These cases establish a different principle and belong to a different class of cases. The right to regulate the charges for a public service is, as shown by these cases, a governmental function, and a municipality has not the power by contract to
125 deprive a state of that power unless expressly authorized so to do. In determining whether or not a state, through its agent, a municipality, has authorized and permitted this governmental power to be contracted away, all doubts will be resolved in favor of the public and against the alleged surrender of power. No question is made but that the *legislative* of a state may, unless restrained by state constitution, contract away this power either by an enactment of its own or by delegating to the municipality power so to do. The Milwaukee case only holds that applying these principles, it did not clearly and unmistakably appear that the state had contracted away this function of the government, or had delegated to the municipality the power to contract away.

The cases already cited show that as regards Ohio the state has delegated to municipalities full power to make a binding contract fixing for a definite term the rate to be charged for this service, and

has thereby disabled the municipality, if not itself, from altering or changing that rate during the fixed term. The law of Ohio is, as was said by Mr. Justice White, of the same kind as that of Michigan and Indiana. See City Railway Company vs. Citizens' Street Railway Company, 166 U. S. 557; Detroit vs. Detroit Citizens' Street Railway Company, 184 U. S. 568.

No question is made but that the franchise grants now being considered did by their terms purport to create a binding contract as to the rate of fare for a term of twenty-five years. It follows from this settled law that a contract has been engendered, mutually binding upon the city and upon the owner of these franchises; that this contract requires the owner during the entire term of twenty-five years to furnish street railway service at the rates of fare therein provided, and that neither the complainant nor the city during this term has the right to change or alter that rate without the consent of the other.

126 The impairment of contract and the due process of law clauses of the Constitution have often been invoked to prevent cities from impairing franchise grants, or forcing a reduction in the contract rate, and the courts have uniformly, despite all criticism, sustained and upheld them and, in so doing, have vindicated the law. It is equally the duty of the courts to uphold these contracts and vindicate the law when it is the grantee therein, and not the city which is seeking to change the terms thereof without the consent of the other party. It is of primary importance that contracts should be upheld by the courts, for the right to contract and the binding obligation of contracts once made lie at the foundation of all public and municipal law.

This proposition is really controlling of all questions argued, but a brief consideration of other questions presented should perhaps also be made.

One proposition strongly urged is that a steam or street railway cannot be compelled by injunction or mandamus to operate all or a part of its system at a loss, and that any effort so to do is depriving it of its property without due process of law. In its final analysis this proposition means that courts will not enforce a valid and binding contract if so to do will inflict loss upon one of the contracting parties. Manifestly the proposition when thus baldly stated will not be contended for. Obviously then the cases cited in which courts have refused to grant an injunction or a mandamus to compel the operation of all or a part of an unprofitable steam or street railway system turns upon different facts from those here present.

Briefly, and without reviewing at length the many cases cited, the law on this proposition, as I understand it, may be summed up as follows: If a railway company is under a statutory or a contract duty to maintain and operate a line, it will be compelled by injunction or mandamus so to do, even though the further operation

127 should be at a loss. It is only when there is no valid or binding obligation to continue operation that the company may, at its discretion, abandon an unprofitable line or branch. If there is a binding obligation to maintain and operate a part of a system, it is

questionable whether that part or branch can ever be abandoned, unless the losses inflicted by its continued operation are such as will wreck the entire system. On the other hand, if the operation of a railway line cannot be continued owing to insolvency, a court will not, by mandamus or otherwise try to compel its further operation, and this is particularly true if its continued operation will perform no useful public service. This refusal of the courts to interfere does not proceed on the view that the company had a right to abandon the operation of an unprofitable system, or of an unprofitable branch. If there is a statutory or contract duty to maintain and operate, this obligation still remains in law, just as a debtor's obligation to pay his debt remains after he has become insolvent; but a court will not attempt to compel by mandamus or otherwise that which is manifestly futile and impossible, for a court has no means of providing capital to operate an insolvent railway company or to continue its operation after it has become insolvent. This, it seems to me, is all that can be claimed for the statement found in some cases that a court will not compel a continued operation at a loss of a railway line or branch.

The true rule with its limitations and exceptions is, in my opinion, fully stated in Southern Railroad Company v. Hatchett, 174 Ky. 463, L. R. A. 1917-D, 1105; note L. R. A. 1915-A, 549. Illustrating and supporting these statements and conclusions are the following: Northern Pacific Railroad Company vs. Washington Territory, 142 U. S. 493; Interurban Company vs. Cincinnati, 93 O. S. 109; State ex rel. vs. Black Diamond Company, 97 O. S. —, O. L. R. April 1, 1918; Fort Loremie vs. Cross, Ohio C. C. A. not reported; State ex rel. vs. Bridgeton & M. T. Co., 68 (or 63) N. J. L. 592, 45 L. R. A.
128 837; State ex rel. vs. Spokane Street Railway Company, 19 Wash. 518, 41 L. R. A. 515; City of Potwin Place vs. Topeka R. R. Company, 51 Kan. 609; Paige vs. Schenectady R. R. Company, 178 N. Y. 102.

These conditions are not present in this case. The complainant does not allege insolvency or make any showing of inability to perform the terms of its contract. Its showing merely is that operation for the year ending June 30, 1918 yielded only 4½ per cent net return on capital actually invested, after deducting operating expenses, taxes and a reasonable allowance for depreciation; and that operation during the year ending June 30, 1919 at the increased wage schedule will result in a loss of $250,000.00 on operation alone.

These statements, it will be noted, apply only to the street railway part of complainant's business. Furthermore, this is not an application by the city for a mandamus or a mandatory injunction to compel continued operation under present conditions, nor a suit to compel specific performance of a harsh and unconscionable bargain. Complainant here is seeking an injunction to protect it in a manifest and plain violation of its contract. The rules of law under which courts have refused to compel the operation of an unprofitable railway branch or an unconscionable contract have no pertinency.

Complainant further contends and urges that it has the right to end these franchise contracts because of new conditions not foreseen

when they were entered into, that is to say, the war and the increased cost of operation due to the war. In support of this proposition are cited the following: The Kronprinzessin Cecilie, 244 U. S. 12, Krell vs. Henry, (1903) 2 K. B. 740; Metropolitan Water Board vs. Dick, Kerr & Co., Appeal Cases, 119 H. of L., (1917) 2 K. B. 1; Liston et al. vs. Owners of Steamship Carpathian (1915) 2 K. B. 42, 112 Law Times Reports, 994.

In my opinion, neither the facts of these cases nor the rules of law announced therein have any application to this situation. The Kronprinzessin Cecilie involves no question except whether its own-
129 ers were excused on July 31, 1914 from continuing its journey to Bremerhaven, Germany in view of the prospects of war and seizure. It was contended that, inasmuch as war had not been declared, and that perhapes the journey might have been completed without seizure, the contract of the vessel's owner to carry gold and deliver it in Europe might still have been possible of performance. It was not denied that actual seizure as a result of war could have discharged the contract because making it impossible of performance, and the court held that the imminence of such seizure was so apparent that due prudence justified the master of the vessel in returning to the United States.

In Krell vs. Henry the parties had made a lease of windows overlooking the Pall Mall for June 26th and 27th, 1902, when the King's coronation procession was to take place. Owing to illness the coronation procession was postponed. It was held that, notwithstanding the lease did not refer to the specific use for which the premises were being hired, namely, to view the coronation procession, and did not provide for ending the contract if for any reason it did not take place, the parties had made the lease in view of the expected coronation procession, and that the unforeseen and unprovided for contingency of its unavoidable postponement excused the lessee from payment. This case is of that class which holds that a destruction of the subject matter of a contract, or of a basis mutually assumed by the parties when entering into it, puts an end to the respective obligations.

In Metropolitan Water Board vs. Dick, Kerr & Company, a contractor had agreed to construct a part of a water system within six years, and after beginning work thereon his equipment and the site upon which he was to do the construction work was seized by the military authorities of Great Britain for war purposes. Obviously here was a vis major rendering impossible the further performance of the contract into which the parties had entered. It was
130 impossible to proceed further.

No such conditions are here present. The performance of these franchise contracts has not been made illegal nor rendered impossible by any superior power. War conditions, it is true, *has* made the performance of them only more burdensome and expensive, so far as the facts now presented tend to show. The war has in a different degree perhaps affected the performance of many, if not the larger part of outstanding and unexecuted contracts between citizens of the United States, yet it would be a strong proposition to

say that all such contracts are thereby rendered void or voidable at the option of the losing party.

The increased cost to complainant of performing its franchise contracts differs only in degree and quality from that due to other economic causes prevailing since they were made. If the war or economic changes had decreased the price of coal, materials, supplies and labor, it would not be urged upon anyone that the city would have the right to declare null and void these contracts or the fare provisions therein, and establish a new rate in accordance with new conditions; and if the city should take such a position it would be met, and justly, with a complaint that such action is impairing the obligation of a valid and binding contract.

In order to make applicable the principles of law urged in this connection, it would be necessary to show that war or military authority had directly interfered in such a manner as to make these contracts illegal or impossible of performance. Nothing less than the equivalent of actual seizure by military authority, or a direct and forcible intervention to prevent further performance, would bring the case within the operation of these rules.

Complainant also invokes the rule announced in the majority opinion in Denver Union Water Company vs. Denver decided by the United States Supreme Court March 4, 1918. That case, in my opinion, has no application. There the Denver Union Water
131 Company had constructed and operated its plant under a franchise expiring in 1910, and thereafter, during a certain period, it remained a tenant by sufferance with the right on its part to discontinue service and remove its pipes and hydrants from the streets, and with the right and power of the city at any time to compel the removal thereof. Later an ordinance was passed to regulate the terms and conditions, including charges, upon which the water company should continue to perform its public service. It was not held that the owner of a water system with an expired franchise, the property of which is subjection to ejection at the will of the city has a right to complain under the due process of law clause because the terms and conditions under which service is rendered in that situation does not yield a fair return on the capital invested. It was held that the so-called regulating ordinance granted a new franchise of indefinite duration, terminable either by the city or the company at such time and under such circumstances as may be consistent with the duty that was owing by both to the inhabitants of Denver, and while this new franchise of indefinite duration remained undetermined by the city, the water company was entitled to enjoin the rate fixed for service because not yielding a fair return on the capital actually invested. This, it was said, deprived the company of its property without due process of law. If the regulating ordinance had not been construed as granting a new franchise of indefinite duration, but had merely been one forbidding a charge higher than a certain rate during such time as the water company saw fit to leave its pipes and hydrants in the streets and perform service, the fair implication is both from the majority and minority opinions and other cases previously decided that no relief would have

been accorded. See also Cleveland Electric Railway Company vs. Cleveland, 204 U. S. 116; Detroit United Railway vs. Detroit, 229 U. S. 39; Denver vs. Denver Union Water Company, 229 U. S. 123.

Complainant's franchise contracts, as already said, have
132 not expired. It is not a tenant of the streets under a franchise contract of indefinite duration, much less a tenant merely by sufferance. It has not the right to remove its tracks at will, or to refuse to operate a street railway line.

I am of opinion that the bill should be dismissed because it does not state facts constituting a valid cause of action in equity.

I am also of opinion that on the facts stated this court has no jurisdiction. There being no diversity of citizenship, jurisdiction is invoked only because of the due process of law clause of the Fourteenth Amendment. The facts stated in the bill show a valid and binding contract from the force and effect of which complainant is seeking to escape. No threatened action of the city authorities is complained of, except that it may endeavor to enforce compliance by complainant with its contract. No charge is made that other than legal methods will be adopted for that purpose, and, in the absence of a statement clearly showing a threatened resort to illegal means, a court must assume that the city officials will proceed in conformity to law.

The law is well settled, as contended for by complainant, that if the facts stated make a real and colorable federal question, jurisdiction properly attaches and will not be ousted, even if on the hearing the claim thus made is held to be without merit in law, or without foundation in fact. On the other hand, when no real and colorable, but only a fraudulent and fictitious federal question is stated, the jurisdiction of the court does not attach for any purpose, and it is the duty of a federal court of its motion to refrain from such an unwarranted exercise of jurisdiction. And even when the threatened act may be an impairment of a contract, or a deprivation of property without due process of law, still if the only means threatened to be used are resort to the courts or to legal proceedings, a case is not stated within the jurisdiction of a federal court.
133 Such seems to me to be the present case. For authority see the following: Penn Mutual Life Insurance Company vs. Austin, 168 U. S. 685; St. Paul Gas Light Company vs. St. Paul, 181 U. S. 143; Defiance Water Company vs. Defiance, 191 U. S. 184; Barney vs. New York, 193 U. S. 437; Des Moines vs. De Moines etc. Railway Company, 214 U. S. 179.

The application for a preliminary injunction will be denied. The motion to dismiss will be granted both for want of jurisdiction and because no valid cause of action in equity is stated.

This opinion should perhaps be ended here, but the importance of the interests at stake moves me to make some further observations, in the hope that the apparently strained relations between the complainant and defendants may be ameliorated. It cannot be denied, on the showing made, that the present war has greatly increased the cost of street railway operation. The award of the National War Labor Board in the wage controversy cannot be regarded otherwise

than binding on the company, and the increase of wages granted by the company pursuant thereto cannot, in any fair sense, be considered as its voluntary act. It is also undoubtedly true, on the showing made, that complainant cannot, under existing conditions, finance any improvements made necessary to meet new demands for heat, light and power, or for increased street railway facilities; and its failure so to do must injure the interests of the defendant and its inhabitants as much as it injures the complainant.

Prolonged operation under these conditions would seem to be a manifest impossibility and must result in impairing the street railway service and grievously harming the people and business of the city. These considerations do not, for the reasons already stated, present any ground upon which a court can grant relief, for it has power only to declare the law and apply it. A sound policy forbids usurpation by the court of governmental power lodged in other departments of the Government. No power inheres in a court
134 either to make contracts for parties or to absolve them from the effect of their contracts when the parties are competent in law to contract and no fraud intervenes in the making thereof.

In view of these well recognized limitations of the court's power, I can only suggest that the present emergency, likely as it is to become much graver in the near future, calls urgently for some kind of accommodation or temporary compromise between the parties. No intimation is made that blame attaches to either, much less that one more than the other is at fault, for "it is undoubtedly true that the present situation is due to the rapid and unexpected evolution of uncontrollable events"; but some kind of a modus vivendi fair to both and to endure at least for the period of the war should be agreed to in order that loss to both may be prevented and the public mind may not be distracted by a street railway war when engrossed in problems of a foreign war. If something is not done no gift of prophecy is required to foresee that the recommendation of the National War Labor Board will be acted upon, namely, that the President of the United States, as Commander in Chief of its armed forces by virtue of the powers inherent in his office and conferred by Congress, will seize and operate the street railway at rates yet to be fixed. Such a shifting of duty and of responsibility would not be creditable to the people of a self-governing city, nor to the business management of an efficient public service corporation.

D. C. WESTENHAVER,
*United States District Judge.*

September 20, 1918.

And afterwards, to-wit: on the 9th day of October, A. D. 1918, a Decree was entered in the Clerk's Office of said Court in said cause, which said Decree is clothed in the words and figures following, to-wit:

*Decree Dismissing Bill.*

135 In the United States District Court for the Southern District of Ohio, Eastern Division.

In Equity.

No. 104.

THE COLUMBUS RAILWAY, POWER AND LIGHT COMPANY, a Corporation of the State of Ohio, Plaintiff,

vs.

THE CITY OF COLUMBUS, OHIO, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred P. Zimpfer, Members of the City Council of said City, Defendants.

*Entry.*

This cause coming on to be heard on the plaintiff's motion for a temporary restraining order and a preliminary injunction based on its verified amended bill and the affidavits in support thereof, and on defendants' motion to dismiss said bill for the reasons therein stated, and having been argued by counsel, it is now, upon consideration thereof, ordered, adjudged and decreed by the Court as follows: That the plaintiff's said motion be and is hereby overruled and denied; that said motion of the defendants to dismiss this suit be and is hereby sustained; that this cause be and is hereby dismissed because the amended bill does not state facts constituting a valid cause of action in equity against the defendants or any of them; that on the facts stated in said bill the Court has no jurisdiction of the cause; and that the defendants recover their costs herein of the plaintiff; to which order, judgment and decree of the Court, and every part thereof, the plaintiff excepts.

Enter.

D. C. WESTENHAVER, *Judge.*

136 And afterwards, to-wit: on the 11th day of October, A. D. 1918, came the Complainant by its Solicitors and filed in the Clerk's Office of said Court its certain Petition for Appeal, which said Petition for Appeal is clothed in the words and figures following, to-wit:

*Petition for Appeal.*

In the United States District Court for the Southern District of Ohio, Eastern Division.

In Equity.

No. 104.

THE COLUMBUS RAILWAY, POWER AND LIGHT COMPANY, a Corporation of the State of Ohio, Plaintiff,

vs.

THE CITY OF COLUMBUS, OHIO, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred P. Zimpfer, Members of the City Council of said City, Defendants.

Petition for Appeal.

The above named plaintiff, The Columbus Railway, Power and Light Company, a corporation of the State of Ohio, conceiving itself aggrieved by the order, judgment and decree entered on the 9th day of October, 1918, in the above entitled cause, doth hereby appeal from said order, judgment and decree to the Supreme Court of the United States, and it prays that this its appeal may be allowed; and that a transcript of the record and proceedings and papers, including the opinion of the Court, upon which said order, judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

WILLIAM O. HENDERSON,
HENRY J. BOOTH,
HENDERSON & BURR,
BOOTH, KEATING, POMERENE & BOULGER,
*Solicitors for Plaintiff and Appellant, The Columbus Railway, Power and Light Company.*

JOSEPH S. CLARK,
HENRY A. McCARTHY,
*Of Counsel.*

137 And afterwards, to-wit: on the 11th day of October, A. D. 1918, came the plaintiff, by its solicitors and filed in the Clerk's Office of said Court its certain Assignment of Errors in said cause, which said Assignment of Errors is clothed in the words and figures following to-wit:

*Assignment of Errors.*

In the United States District Court for the Southern District of Ohio, Eastern Division.

In Equity.

No. 104.

THE COLUMBUS RAILWAY, POWER AND LIGHT COMPANY, a Corporation of the State of Ohio, Plaintiff,

vs.

THE CITY OF COLUMBUS, OHIO, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred P. Zimpfer, Members of the City Council of said City, Defendants.

## Assignment of Errors.

The above named plaintiff and appellant, The Columbus Railway, Power & Light Company, now comes and makes and files this its assignment of errors:

(1) Said District Court erred in dismissing the above entitled cause.

(2) Said Court erred in holding, deciding and decreeing that said cause should be dismissed because the amended bill does not state facts constituting a cause of action in equity against the defendants or any of them.

(3) Said Court erred in holding, deciding and decreeing that said bill does not state facts constituting a cause of action in equity against the defendants or any of them.

(4) Said Court erred in holding, deciding and decreeing
138 that the facts stated in said bill *does* not show any federal question for the consideration and decision of the Court.

(5) Said Court erred in holding, deciding and decreeing that said bill does not state any facts which show the Fourteenth Amendment to the Constitution of the United States has been invaded or violated or any right of the plaintiff under said Amendment has been invaded or violated by the defendants or any of them; and that neither said Amendment nor any right of the plaintiff thereunder would be invaded or violated by the enforcement by the defendants or any of them of said ordinances mentioned in said bill.

(6) Said Court erred in holding and deciding that said two franchise ordinances in said bill are respectively contracts which are binding and unalterable without the consent of the parties thereto during the terms thereof.

(7) Said Court erred in holding and deciding that said two franchise ordinances each required the plaintiff, during the respective terms thereof, to furnish street railway service at the rates of fare therein prescribed.

(8) Said Court erred in holding and deciding that said two franchise ordinances each required the plaintiff, during the respective terms thereof, to furnish the street railway service at the rates of fare therein prescribed, notwithstanding the fact that, by reason of unexpected and changed conditions said rates of fare will not yield sufficient return to plaintiff to pay its operating expenses, taxes and a proper amount for depreciation of property used in serving the public.

(9) Said Court erred in holding and deciding that the plaintiff had not and has not the right to terminate or suspend said two franchise ordinances, or either of them, because of the new conditions resulting from the present war and the increased cost of operation due to said war, which were not foreseen when said ordinances were passed and accepted.

139 (10) Said Court erred in overruling plaintiff's motion for a temporary restraining order and a preliminary injunction.

(11) Said Court erred in holding, deciding and decreeing that it had and has no jurisdiction in said cause.

(12) Said Court erred in holding and deciding that said bill does not state a case within the jurisdiction of said Court.

(13) Said Court erred in sustaining the motion of the defendants to dismiss this suit.

WILLIAM O. HENDERSON,
HENRY J. BOOTH,
HENDERSON & BURR,
BOOTH, KEATING, POMERENE & BOULGER,
*Solicitors for Plaintiff and Appellant, The Columbus Railway, Power & Light Company.*

JOSEPH S. CLARK,
HENRY A. McCARTHY,
*Of Counsel.*

140 And afterwards, to-wit: on the 14th day of October, A. D. 1918, an Order Allowing Appeal was entered in the Clerk's Office of said Court in said cause, which said Order is clothed in the words and figures following, to-wit:

*Order Allowing Appeal.*

In the United States District Court for the Southern District of Ohio, Eastern Division.

In Equity.

No. 104.

THE COLUMBUS RAILWAY, POWER AND LIGHT COMPANY, a Corporation of the State of Ohio, Plaintiff,

vs.

THE CITY OF COLUMBUS, OHIO, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred P. Zimpfer, Members of the City Council of said City, Defendants.

Entry.

And now it appearing that the above named plaintiff has filed its petition for appeal from the order, judgment and decree herein rendered against it and entered on or about the 9th day of October, 1918, to the Supreme Court of the United States and has also filed its assignment of errors pursuant to the rules of said Supreme Court, it is ordered and adjudged that said appeal from said order, judgment and decree be and the same hereby is allowed and granted as prayed for in said petition for appeal, upon the plaintiff giving its appeal bond to the defendants, with sufficient surety, in the penal sum of five hundred dollars ($500), conditioned for costs on appeal according to law.

Enter: D. C. WESTENHAVER, *Judge.*

141 And afterwards, to-wit: on the 14th day of October, A. D. 1918, came the Plaintiff, and filed in the Clerk's Office of said Court, its certain Bond on Appeal in said cause, which said Bond on Appeal is clothed in the words and figures following, to-wit:

*Bond on Appeal.*

Know all Men by these Presents, That we, The Columbus Railway Power & Light Company, as principal, and The United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto The City of Columbus, Ohio, George J. Karb, Mayor of said City, Henry L. Scarlett, City Attorney and City Solicitor of said City, James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck and Fred P. Zimpfer, Members of

the City Council of said city, in the full and just sum of Five Hundred 00/100 Dollars, to be paid to the said The City of Columbus, Ohio, George J. Karb, Mayor of said City, Henry L. Scarlett, City Attorney and City Solicitor of said City, James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck and Fred P. Zimpfer, Members of the City Council of said City, their certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of October, in the year of our Lord one thousand nine hundred and eighteen (1918).

Whereas, lately at a term of the District Court of the United
142 States for the Southern District of Ohio, Eastern Division, in a suit depending in said Court, between The Columbus Railway, Power and Light Company, a corporation of the State of Ohio, plaintiff, and said City of Columbus, Ohio, said Karb as such Mayor, said Scarlett as such City Attorney, said Thomas as said City Clerk, and said Westlake, Alcott, Griffin, Nailor, Weinland, Lamneck and Zimpfer as members of said City Council, Defendants, a decree was rendered against the said The Columbus Railway, Power & Light Company and the said The Columbus Railway, Power & Light Company, having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said The City of Columbus, Ohio, George J. Karb, Mayor of said City, Henry L. Scarlett, City Attorney and City Solicitor of said City, James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck and Fred P. Zimpfer, members of the City Council of said City, citing and admonishing them to be and appear at a session of the United States Supreme Court to be holden at the City of Washington, District of Columbia, on the 13th day of November next.

Now, the condition of the above obligation is such, That if the said The Columbus Railway, Power & Light Company shall prosecute its said appeal to effect and answer all damages and cost if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

THE COLUMBUS RAILWAY, POWER & LIGHT COMPANY,
By S. G. McMEEN, *Its President.* [SEAL.]
UNITED STATES FIDELITY AND GUARANTY COMPANY. [SEAL.]
By TRAFFORD B. TALLMADGE,
*Attorney in Fact.*

Attest:
A. T. BURINGTON, *Secretary.*

Approved by—
D. C. WESTENHAVER,
*U. S. District Judge.*

143 Thereupon there was issued a certain Citation in the above entitled cause, directed to said defendants, which said Citation is clothed in the words and figures following, towit:

*Citation.*

United States Supreme Court.

To The City of Columbus, Ohio, a municipal corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck and Fred Zimpfer, Members of the City Council of said City, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court, to be holden at the City of Washington, on the 13th day of November next, pursuant to an Appeal, filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, wherein The Columbus Railway, Power and Light Company, a corporation of the State of Ohio, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable, Edward Douglass White, Chief Justice of the United States, this 14th day of October, in the year of our Lord one thousand nine hundred and eighteen, and of the Independence of the United States of America, the one hundred and forty-third.

D. C. WESTENHAVER,
*United States District Judge.*

144 And afterwards, towit: on the 24th day of October, A. D. 1918, there was returned and filed the citation heretofore issued herein with the Marshal's Return endorsed thereon as follows, towit:

*Marshal's Return.*

Received this writ at Columbus, Ohio, on October 21, 1918, and on the same day served same on the within named The City of Columbus, Ohio, a municipal corporation, etc., by delivering a true copy of this writ, with the endorsements thereon, to George J. Karb, Mayor of said City by handing same to him personally at Columbus, Ohio; and on the same day I made further service of said writ on said City of Columbus by delivering a true copy of this writ, with the endorsements thereon, to Milton W. Westlake, Vice Mayor of said City, by handing same to him personally, at Columbus, Ohio.

And on October 21, 1918, I served same on the within named George J. Karb, Mayor of said City of Columbus, Henry L. Scarlett, City Attorney and City Solicitor of said City, James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck and Fred Zimpfer, Members of the City Council of said City, by delivering to each a true copy of this writ, with the endorsements thereon, by handing said copy to each personally at Columbus, Ohio.

M. DEVANNEY,
*U. S. Marshal, S. D. O.*,
By WM. J. LUCKS, *Deputy*,
By J. NORRISH, *Deputy*.

*Fees.*

| | |
|---|---|
| 12 services | $24.00 |
| 12 copies | 3.60 |
| 1 mile | .06 |
| Total | $27.66 |

145 *Clerk's Certificate.*

THE UNITED STATES OF AMERICA,
*Southern District of Ohio,*
*Eastern Division, ss:*

I, B. E. Dilley, Clerk of the District Court of the United States of America, within and for the District and Division aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said Court in the above entitled cause, as the same appears of record and on file in the clerk's office of said Court.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Columbus, in said District, this 24" day of October, A. D. 1918.

[Seal United States District Court, Southern Dis. Ohio.]

B. E. DILLEY, *Clerk*,
By C. P. WHITE, JR., *Deputy*.

146 United States Supreme Court.

UNITED STATES OF AMERICA,
*Sixth Judicial Circuit, ss:*

To The City of Columbus, Ohio, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck and Fred Zimpfer, Members of the City Council of said City, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court to be holden at the City of Washington on the* 13th day of November, next, pursuant to an Appeal, filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, wherein The Columbus Railway, Power and Light Company, a corporation of the State of Ohio, is appellant and you are appellees to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 14th day of October, in the year of our Lord one thousand nine hundred and eighteen, and of the Independence of the United States of America the one hundred and forty-third.

D. C. WESTENHAVER,
*United States District Judge.*

147 Received this writ at Columbus, Ohio, on October 21, 1918, and on the same day served same on the withinnamed The City of Columbus, Ohio, a municipal corporation, etc., by delivering a true copy of this writ, with the endorsements thereon, to George J. Karb, Mayor of said City by handing same to him personally at Columbus, Ohio; and on the same day I made further service of said writ on said City of Columbus by delivering a true copy of this writ, with the endorsements thereon, to Milton W. Westlake, Vice Mayor of said City, by handing same to him personally, at Columbus, Ohio.

And on October 21, 1918, I served same on the within named George J. Karb, Mayor of said City of Columbus, Henry L. Scarlett, City Attorney and City Solicitor of said City, James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck and Fred Zimpfer, Members of the City Council of said City,

*Not exceeding 30 days from the day of signing.

by delivering to each a true copy of this writ, with the endorsements thereon, by handing said copy to each personally at Columbus, Ohio.

M. DEVANNEY,
*U. S. Marshal, S. D. O.*,
By WM. J. LUCKS, *Deputy*,
By J. NORRISH, *Deputy*.

*Fees.*

| | |
|---|---|
| 12 services | $24.00 |
| 12 copies | 3.60 |
| 1 mile | .06 |
| Total | $27.66 |

[Endorsed:] Marshal's Civil Docket No. 8678. Rec'd Oct. 21/18. Filed Oct. 24, 1918, 2 p. m. B. E. Dilley, Clerk.

Endorsed on cover: File No. 26,801. S. Ohio D. C. U. S. Term No. 715. The Columbus Railway, Power and Light Company, appellant, vs. The City of Columbus, Ohio, et al. Filed October 26th, 1918. File No. 26,801.

# TRANSCRIPT OF RECORD

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

## No. 720.

I. TUCKER BURR ET AL., PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF PARTINSON & BURR, APPELLANTS,

vs.

THE CITY OF COLUMBUS, OHIO, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED NOVEMBER 22, 1913.

(26,825)

# (26,825)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1918.

# No. 739.

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I. TUCKER BURR ET AL., PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF PARKINSON & BURR, APPELLANTS,

*vs.*

THE CITY OF COLUMBUS, OHIO, ET AL.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 21, 1918.

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United States Supreme Court.

No. —.

I. Tucker Burr, Winthrop Burr, A. Lawrence Pierson, Thomas B. Gannett, Jr., Constantine Hutchins, Richard Austin, James W. Eheeler, and William J. Sturgis, Partners Doing Business under the Firm Name and Style of Parkinson & Burr, Appellants,

vs.

The City of Columbus, Ohio, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred P. Zimpfer, Members of the City Council of said City, Appellees.

Appeal from the United States District Court for the Southern District of Ohio, Eastern Division.

*Record.*

William O. Henderson, Henry J. Booth, Booth, Keating, Pomerene & Boulger, Henderson & Burr, Columbus, Ohio, Solicitors for Appellants.

Joseph S. Clark, Henry A. McCarthy, Philadelphia, Pa., of Counsel for Appellants.

Henry L. Scarlett, Columbus, Ohio, Solicitor for Appellees.

David F. Pugh, Joseph A. Godown, Columbus, Ohio, of Counsel for Appellees.

1 At a Stated Term of the District Court of the United States within and for the Sixth Judicial Circuit and Eastern Division of the Southern District of Ohio, Begun and Held at the Court-rooms, in the City of Columbus, on the First Tuesday of June, Being Also the Fourth Day of That Month, in the Year of Our Lord One Thousand Nine Hundred and Eighteen, and in the One Hundred and Forty-second Year of the Independence of the United States of America.

Present: The Honorable Howard C. Hoilister, U. S. District Judge.

Among the proceedings had were the following, to-wit.

No. 106.

I. Tucker Burr, Winthrop Burr, A. Lawrence Pierson, Thomas B. Gannett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler, and William J. Sturgis, Partners Doing Business under the Firm Name and Style of Parkinson & Burr, Plaintiffs,

vs.

The City of Columbus, Ohio, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred P. Zimpfer, Members of the City Council of said City, Defendants.

Be it remembered that heretofore, towit, on the 16th day of September, A. D. 1918, came the Plaintiffs, by their Solicitors and filed in the Clerk's Office of said Court, their certain Bill of Com-
2 plaint in this cause, against said defendants, which said Bill of Complaint is clothed in the words and figures following, to-wit:

In the United States District Court, Southern District of Ohio, Eastern Division.

No. 106.

I. Tucker Burr, Winthrop Burr, A. Lawrence Pierson, Thomas B. Gannett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler, and William J. Sturgis, Partners Doing Business under the Firm Name and Style of Parkinson & Burr, Plaintiffs,

vs.

The City of Columbus, Ohio, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred P. Zimpfer, Members of the City Council of said City, Defendants.

*Bill of Complaint.*

To the Honorable the Judges of the United States District Court, Southern District of Ohio, Eastern Division:

The plaintiffs complain and say:

1. The plaintiff, I. Tucker Burr, is a citizen of the State of Massachusetts and resides in the City of Boston in said State; the plaintiff Winthrop Burr, is a citizen of the State of New York and resides in the City of New York in said State; the plaintiff, A. Lawrence Pierson, is a citizen of the State of New Jersey and resides in Essex Falls, Essex County in said State; the plaintiff, Thomas B. Gannett, Jr., is a citizen of the State of Massachusetts and resides in the City
3 of Manchester in said State; the plaintiff, Constantine Hutchins, is a citizen of the State of Massachusetts and resides in the City of Dedham in said state; the plaintiff, Richard Austin, is a citizen of the State of Massachusetts and resides in the City of Dover in said state; the plaintiff, James W. Wheeler, is a citizen of the State of Massachusetts and resides in the City of Newton in said state; and the plaintiff, William J. Sturgis, is a citizen of the State of New York and resides in the City of New York in said state. The said plaintiffs are partners doing business in the City of Boston, in the State of Massachusetts, under the firm name and style of Parkinson & Burr, and are the owners and holders of more than two hundred thousand dollars ($200,000.00) of the First Refunding Extension and Sinking Fund Five Per Cent. Mortgage Bonds described in paragraph 11 hereof.

2. The defendant, the City of Columbus, Ohio, is a municipal corporation duly organized under the laws of the State of Ohio; the defendant, George J. Karb, is the duly elected, qualified and acting Mayor of said City of Columbus; the defendant, Henry L. Scarlett, is the duly elected, qualified and acting City Attorney and City Solicitor

of said city; the defendant, James J. Thomas, is the duly elected, qualified and acting City Clerk of said city; the defendants, Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred P. Zimpfer, are the duly elected, qualified and acting members of the City Council of said city; and all of said defendants are citizens of said state and all of said defendants, who are officers as aforesaid, are residents of said City of Columbus.

3. This suit is between citizens of different states, and the matter in controversy herein exceeds the sum of Three Thousand Dol-
4 lars ($3,000.00), exclusive of interest and costs.

4. The Columbus Railway, Power & Light Company is a corporation of the State of Ohio duly incorporated, organized and existing for the purpose, among others, of acquiring by purchase or lease, constructing, extending, owning, maintaining and operating by means of electricity, street railroads or interurban railroads, or both, in the City of Columbus, County of Franklin and State of Ohio, and lines of such railroads extending from said city, within, through and between the municipalities located in said county and in territory contiguous to said county, with such termini as are or may be designated in the several ordinances, resolutions and orders granting and establishing the same; and it owns and operates, among other things, a system of street railway lines in the City of Columbus, Ohio.

Since the enactment of the two ordinances mentioned in this paragraph and until the 20th day of August, 1918, said company and its predecessors in title have been operating said system of street railway lines in the City of Columbus, which system consists of more than one hundred and ten (110) miles of main track with necessary switches, turnouts and overhead construction, power houses and other necessary equipment, under two certain franchises granted by said city, towit:

(a) A franchise granted by an ordinance, entitled:

"An Ordinance, No. 17801,

Renewing to The Columbus Railway Company, for a term of twenty-five (25) years, its grants, rights, privileges and franchises, to maintain and operate its tracks and lines of street railroad upon the streets and avenues, and parts of streets and avenues, hereinafter mentioned, in the City of Columbus, Ohio, and prescribing the terms and conditions thereof, and repealing the provisions of any and all ordinances and resolutions, and parts of ordinances and resolutions, inconsistent with the terms of this ordinance,"

said ordinance having been duly passed by the City Council of
5 said city on February 4, 1901, and duly approved by the Mayor of said city on February 6, 1901, and all rights and privileges thereunder having been thereafter transferred and conveyed by said The Columbus Railway Company to said The Columbus Railway, Power & Light Company by deed dated January 29, 1914. Said franchise ordinance has been sometimes called and is

hereinafter referred to as the Blanket Franchise Ordinance, a copy of which is hereto attached, marked "Exhibit No. 1" and made a part hereof.

(*b*) A second franchise granted by an ordinance entitled:

"An Ordinance, No. 17802,

Granting permission to The Central Market Street Railway Company, its successors and assigns, to construct, operate and maintain a single or double track street railway, with necessary sidetracks, curves, turn-outs and switches in the following streets of the city of Columbus, Ohio, towit: Rich street, Fifth street, Donaldson street, Livingston avenue, Mohawk street, Reinhard avenue, Jaeger street, Hanford street, Fourth street, Hosack street, Innis avenue and Parsons avenue to the south corporation line of said City of Columbus,"

said ordinance having been duly passed by the City Council of said city on January 21, 1901, and duly approved by the Mayor of said city on January 22, 1901, and all rights and privileges thereunder having been transferred and conveyed, after foreclosure proceedings, to said The Columbus Railway, Power & Light Company under its former name of The Columbus Traction Company, by deed dated March 1, 1907. A copy of said second franchise ordinance, which is hereinafter referred to as the Central Market Franchise Ordinance, is hereto attached, marked "Exhibit No. 2" and made a part hereof.

6. In addition to said Blanket Franchise and said Central Market Franchise, certain other franchises were previously granted by said City of Columbus to predecessors in title of The Columbus Railway Company, as follows, towit:

6 On Main street, (formerly called Friend street) from High street to Rose avenue; on State street from High street to Grant avenue; thence in a northerly direction on Grant avenue to Oak street; thence on Oak street in an easterly direction to Sherman avenue, (formerly called Bruce street); on Long street from High street in an easterly direction to Mulberry street, and thence in a southerly direction on Mulberry street from Long street to Broad street; on Cleveland avenue in a northerly direction from Long street to Mt. Vernon avenue; thence in an easterly direction on Mt. Vernon avenue to Washington avenue; on West Broad street from High street to a point opposite the center of the east driveway to the Central Hospital for the Insane, (the same being the corporation line of the City of Columbus as established by ordinance of the City of Columbus, passed on or about May 18th, 1890); on Glenwood avenue in a southerly direction from Broad street to the Harrisburg pike; thence in a southwesterly direction on the Harrisburg pike to Greenlawn cemetery.

All of said last mentioned franchises were granted without limitation of time and are perpe*u*tal. They were duly and legally transferred and conveyed to said The Columbus Railway Company and by said Company duly and legally transferred and conveyed to said The Columbus Railway, Power & Light Company by the aforesaid

deed dated January 29, 1914. The streets covered by said perpetual franchises are set forth in Section 20 of said Blanket Franchise Ordinance, Exhibit No. 1, and the claim of said The Columbus Railway Company that they are perpetual is recognized by said city in said section but is not there admitted. All of the franchises mentioned in this paragraph and the last preceding paragraph were duly accepted by the grantees thereof respectively.

7. Under the terms and provisions of said Blanket Franchise Ordinance, Exhibit No. 1, the grantee and its successors and assigns were required in due course as therein provided to issue and sell, and they did issue and sell, eight tickets for twenty-five cents, and to give, and they did give, universal free transfers thereon. The issue and sale of said tickets with universal free transfers was instituted April 1, 1912, and continued until August 20th, 1918,
7 when said franchise was surrendered and cancelled by said The Columbus Railway, Power & Light Company as hereinafter stated.

8. Under the terms and provisions of said Central Market Franchise Ordinance, Exhibit No. 2, that company issued and sold eight tickets for twenty-five cents and gave universal free transfers, and continued so to do as long as it remained the owner of said franchise; and said The Columbus Railway, Power & Light Company continued the issuing and selling of eight tickets for twenty-five cents and the giving of such transfers from the time when it became the owner of said franchise until August 20th, 1918, when said franchise was surrendered and cancelled by said The Columbus Railway, Power & Light Company as hereinafter stated.

9. Said The Columbus Railway, Power & Light Company in the operation of said system of street railway lines has developed and is conducting an extensive business in the carrying of street railway passengers in said city; and, during the year 1917, averaged 234,162 car rides per day and carried on its said lines in said city a total of more than 81,819,395 passengers, for which it received approximately two and six tenths (2 6/10) cents per car ride, a person riding upon a transfer being counted as a passenger in these figures. Said The Columbus Railway, Power & Light Company, by its said street railway system, including more than 110 miles of main track, supplies the only street railway service in said City of Columbus and its suburbs, except a very limited service furnished by interurban cars running at long intervals upon certain streets. Said The Columbus Railway, Power & Light Company also supplies electricity for light and power for domestic and commercial use, and power for war and industrial purposes in said city and its suburbs. Said City
8 of Columbus and its suburbs contain a population of more than 250,000 and constitute a large industrial, manufacturing, military and railroad center in which are located numerous shops, factories and plants wherein more than 25,000 persons are now and for a long time will be employed in the manufacture of munitions, clothing and a great variety of other war materials for use directly by the United States Government and for use by those who are furnishing war supplies to and for the Government, in the pros-

ecution of the present war; also large railroad shops in which are employed many thousands of persons who are, and will for a long time continue to be, engaged in the manufacture and repair of railroad engines, cars and other equipment used and to be used by the United States Railroad Administration in its maintenance and operation of the railroad systems of the United States; also a very large Storage Depot for the storage and distribution of munitions and other supplies for Government use, at which are employed more than 2000 persons. A large majority of said employes in said shops, factories and plants, in said railroad shops and at said Storage Depot, do and must depend upon the street railway service of said The Columbus Railway, Power & Light Company as their means of transportation to and from their places of employment; and in said area is located also the Columbus Barracks in which are quartered more than 100,000 recruits per annum, who also are dependent upon said street railway service. The discontinuance or impairment of said company's street railway service would cause irreparable harm to the Government of the United States, to the City of Columbus and to all persons dependent upon said service.

9 10. Said the Columbus Railway, Power & Light Company has now invested in said street railway lines and equipment, on a conservative basis of investment and physical value, more than twelve millions of dollars. Said company and its predecessors in title have from time to time issued and sold, and there are now outstanding in the hands of bona fide holders for value, mortgage bonds in large amounts, of which the sum of approximately $8,600,000.00 are properly chargeable against its street railway property, the annual interest charge upon which is more than $400,000.00.

11. Said $8,600,000.00 of bonds mentioned in the last paragraph includes approximately $1,500,000.00 of the so-called First Refunding and Extension Sinking Fund Five Per Cent. Mortgage Bonds of said The Columbus Railway, Power & Light Company, due October 1st, 1940, and secured by the mortgage, or deed of trust, of said company executed and delivered to Girard Trust Company, Trustee, on or about the 1st day of April, 1915, and covering all of the property of said The Columbus Railway, Power & Light Company, including all of its street railway lines and other property hereinbefore referred to.

12. Said The Columbus Railway, Power & Light Company has at all times operated and managed, and is now operating and managing said system efficiently, economically, conservatively, intelligently, safely and at the lowest possible cost consistent with adequate and sufficient service to the public. Notwithstanding such operation and management, the results have shown increased and increasing costs of operation and decreased and decreasing net revenue, which said increased and increasing costs of operation and decreased and decreasing net revenue have been caused by and are the direct

10 result of the war in which the United States is now engaged.

The revenues derived from the operation of said street railway property for the twelve months ending June 30, 1918, after de-

ducting operating expenses, taxes and a proper charge for depreciation, were $301,987.00, an amount insufficient by approximately $100,000.00 to pay the interest on said $8,600,000.00 of bonds outstanding and properly chargeable against said company's street railway property.

13. During the month of June, 1918, street railway employes of The Columbus Railway, Power & Light Company demanded an increase in their wages, which said increase said company could not pay, and thereupon said employes inaugurated a strike which caused said company's service to be entirely discontinued for two days; and after some negotiations, the controversy was referred to the National War Labor Board for decision, and that Board, on July 31, 1918, rendered its decision whereby it fixed such a scale of wages for said employes that said company has been compelled to increase the wages of its street railway employes more than fifty per cent. per annum from and after July 1, 1918. Said increase in the wage account of said company will increase the operating expenses of its street railway property in the approximate sum of $560,000.00 per year, so that unless the defendants be enjoined from enforcing said rates prescribed by said ordinances, Exhibits No. 1 and No. 2, said company's gross earnings therefrom for the current year ending June 30, 1919, will fall short of paying its said operating expenses, depreciation and taxes by not less than $250,000, and there will be nothing left of said earnings with which to pay said interest charges of more than $400,000.00 or to yield any return to said company upon the value of its property employed in furnishing said
11 street railway service.

14. On the 20th day of August, 1918, said The Columbus Railway, Power & Light Company surrendered and cancelled both said Blanket Franchise and said Central Market Franchise by notification in writing addressed to the City of Columbus, Ohio, the Mayor, City Council and City Clerk of said city, a copy of which is hereto attached, marked "Exhibit No. 3" and made part hereof.

15. The rates of fare prescribed by the terms and conditions of said two franchises last above mentioned were not either before or when said franchises were surrendered and cancelled as hereinbefore stated, and would not be if longer enforced against said The Columbus Railway, Power & Light Company, sufficient to enable said company to maintain its street railway property in good order and repair and to perform its duty as a public utility, and particularly to furnish the street railway service hereinbefore in paragraph 9 set forth; the further operation of said company's street railway property at said rates of fare would be not only impracticable but impossible, both financially and otherwise, and would bankrupt said company within a short time; and the enforcement of said rates of fare would violate the Fourteenth Amendment to the Constitution of the United States, in that said rates of fare are and would be unjust, unreasonable, inadequate and confiscatory; and their enforcement would deprive the plaintiffs of their property without due process of law, and would render the further operation of all its property not only impracticable but impossible, both financially and otherwise, because the cost thereof including taxes, depreciation and

bond interest would far exceed its entire earnings received
12 from all sources, and would soon bankrupt said company as aforesaid.

In the event of the bankruptcy of said company as hereinabove set forth, claims for labor and materials furnished to said company would become a lien on said property prior to the lien of said mortgage securing plaintiffs' said bonds, the operation of said street railway lines would be impossible except through the appointment of a receiver therefor, and then only temporarily, if at all, through the issuance of receiver's certificates, which would become a lien upon the property covered by said mortgage prior to the lien of said mortgage itself, the proceeds of said certificates would be necessary to pay the deficit in said company's operating expenses, and such operation of said street railway property would impair and destroy the security of plaintiffs' said bonds, and prevent the payment of the same and the interest thereon, and ultimately make it impossible to furnish service on said street railway lines.

16. The defendants threaten to, and will, unless enjoined by this court, attempt to force said company to continue to operate its street railway property under said Blanket Franchise and said Central Market Franchise upon all of the streets of said city, including those streets covered by the aforesaid perpetual franchises, and to force it to continue to issue and sell eight tickets for twenty-five cents and give universal free transfers; and said threat of the defendants, if carried out, would compel the said company to carry passengers upon its said lines at unjust, unreasonable, inadequate and confiscatory rates, in violation of said Fourteenth Amendment to the Constitution of the United States, and to the great and irreparable harm of the plaintiffs as herein set forth.

13 17. In anticipation of a controversy between said city on the one side and the said company on the other over the right of the said company to surrender and cancel the aforesaid two franchises and its right to put into force and effect new rates of fare, the details of which are set forth in Exhibit No. 3 of this bill of complaint, the said company is giving to its passengers who pay the new rates of fare appropriate rebate checks representing the difference between the new rates of fare and those prescribed by the aforesaid two ordinances, and offers to redeem said rebate checks provided it shall be finally decided that it was not justified in adopting said new rates of fare.

18. The enforcement of the defendants or any of them of the last aforesaid two franchise ordinances, or either of them, or any attempt by them to enforce the same, would cause the plaintiffs immediate and irreparable injury, loss and damage, for which they have no adequate remedy at law.

19. This bill of complaint presents a case within the jurisdiction of this court of equity by reason of the diversity of citizenship of the parties hereto and the character of the relief herein sought by them and in further view of the controversies, confusion, risks and multiplicity of suits which would necessarily be occasioned by the resistance of said company to the enforcement of the unjust, unreasonable, inadequate and confiscatory rates of fare prescribed in

the aforesaid two franchise ordinances, and that, because of the public interests and the great number of people to be affected thereby, only a court of equity is competent to meet such an emergency and to determine once and for all and without a multiplicity of suits matters that affect not only individuals, but also the interests of the entire community in the use of the public
14 streets of the City of Columbus and in the administration of the affairs of said company, a quasi-public corporation, operating lines of street railway in said streets.

Wherefore, the plaintiffs pray:

First. That the defendants and each of them make full, direct and true answer to the matters, all and singular, herein stated and complained of, but not under oath, this being hereby waived.

Second. That the defendants and each of them, their officers, servants, employes and agents, and their respective successors in office, be temporarily restrained and enjoined, pending this suit, and, on final hearing, be forever enjoined from in any way forcing or compelling, or attempting to force or compel, said The Columbus Railway, Power & Light Company to operate its lines of street railway, or any of them, in the City of Columbus, under said Blanket Franchise Ordinance or under said Central Market Franchise Ordinance, or either of them; from in any way forcing or compelling, or attempting to force or compel, the said company to charge and collect the rates of fare prescribed by the aforesaid two franchise ordinances; from in any way enforcing, or attempting to enforce, against the said company the aforesaid two franchise ordinances, or either of them, or any provision of either of them.

That the plaintiffs may have all such other and further relief as to equity may seem meet and the nature of the case may require.

WILLIAM O. HENDERSON,
HENRY J. BOOTH,
HENDERSON & BURR,
BOOTH, KEATING, POMERENE & BOULGER,
*Solicitors and Counsel for Plaintiffs.*

JOSEPH S. CLARK,
HENRY A. McCARTHY,
*Of Counsel.*

15 STATE OF PENNSYLVANIA,
*County of Philadelphia, ss:*

Before me, a Notary Public in and for the Commonwealth of Pennsylvania, residing in the City of Philadelphia, personally appeared William Lilley, who, being duly sworn according to law, deposes and says that he has read the foregoing bill of complaint; that he has knowledge of the facts in said bill of complaint set forth, and that the facts therein set forth are true.

WILLIAM LILLEY.

Sworn to and subscribed before me this 13th day of September, 1918.

[SEAL.] W. EVANS SMITH,
*Notary Public.*

Commission expires Jan. 21, 1921.

16 EXHIBIT No. 1.

An Ordinance, No. 17801,

Renewing to The Columbus Railway Company, for a term of twenty-five (25) years, its grants, rights, privileges and franchises, to maintain and operate its tracks and lines of street railroad upon the streets and avenues, and parts of streets and avenues, hereinafter mentioned, in the City of Columbus, Ohio, and prescribing the terms and conditions thereof, and repealing the provisions of any and all ordinances and resolutions, and parts of ordinances and resolutions, inconsistent with the terms of this ordinance.

(City Record Book 11, Page 524.)

Preamble.

Whereas, The Columbus Railway Company is the owner of and now engaged in operating certain lines of street railroad in the City of Columbus, Ohio, being the lines heretofore owned and operated by it, as well as those purchased from The Columbus Central Railway Company, and being the same lines enumerated in the title hereof; and

Whereas, Said several lines of street railroad owned by said The Columbus Railway Company, are held and operated by it under the authority of ordinances passed at various times, and for various periods, and containing various and inconsistent conditions as to the operation of lines of street railroad thereunder, and so limiting the franchises thereunder granted that they expire at different dates up to and including the year 1917; and

Whereas, In order to improve the service rendered by the said The Columbus Railway Company, it is desired that the several lines of street railroad now operated under separate and different franchise ordinances, may be operated by said company as one complete and entire system, thereby better accommodating the public and facilitating the running of the cars of said company; and

17 Whereas, It is desired that the franchise rights of said The Columbus Railway Company to maintain and operate its tracks and lines of street railroad upon each and all of said several streets and avenues shall be made to expire at one and the same date; and

Whereas, It is desired that the burden to be borne by said The Columbus Railway Company in the way of payment of cost of street cleaning, sprinkling, paving and repairs upon the several streets and avenues occupied by its lines, shall be uniform; and

Whereas, The provisions of the existing ordinances under which the said The Columbus Railway Company claims the right to maintain and operate its lines of street railway upon the several streets and avenues, prescribe different and varying rates of fare, and it is desired that there shall be uniformity in, and a reduction of, the rates of fare, and a general system of transfers, applicable to each and every part of the system of street railroads owned and operated by said The Columbus Railway Company; and,

Whereas, A renewal of the grants, rights, privileges and franchises of said The Columbus Railway Company, on the streets and avenues herein and hereinafter named, for said term of twenty five years, upon the conditions hereinafter prescribed in this ordinance, will be conducive to the public interests; now therefore,

Be it ordained by the City Council of the City of Columbus, Ohio, as follows, to-wit:

Routes.

18 Section 1. That the franchises, rights and privileges of The Columbus Railway Company to maintain and operate its tracks and lines of street railroad, with all necessary switches, connections, turn-outs and other appliances suitable and proper for its use, together with the franchise, right and privilege to operate street railroad cars thereon, on the following streets and avenues, and parts of streets and avenues, in the City of Columbus, Ohio, viz:

On High street from the south corporation line of the City of Columbus to its north corporation line, including the loop at Olentangy park; on Chittenden avenue in an easterly direction, from High street to The Cleveland, Cincinnati, Chicago and St. Louis Railway Company's tracks, and alongside said tracks in a southerly direction, forming what is known as the Fair Ground loop; on Goodale street in an easterly direction, from High street to Fourth street; on Chestnut street in an easterly direction from High street to Fourth street; thence on Fourth street in a northerly direction to Naghten street; thence on Naghten street in an easterly direction to Neil street; thence on Neil street in a northerly direction to Mt. Vernon avenue; thence on Mt. Vernon avenue in an easterly direction to Cleveland avenue; thence on Cleveland avenue in a northerly direction to Buckingham street; thence on Buckingham street in an easterly direction to Jefferson avenue; thence on Jefferson avenue in a northerly direction to Leonard avenue; thence on Leonard avenue in an easterly and northeasterly direction to the north corporation line of the City of Columbus; on Mt. Vernon avenue in an easterly direction from Washington avenue to Taylor avenue; thence on Taylor avenue in a northerly direction to Atcheson street;
19 thence on Atcheson street in an easterly direction for a distance of two hundred (200) feet; on Livingston avenue in an easterly direction, from High street to Kelton avenue, including the loop into the Driving park as now built; on Schiller street in an easterly direction, from High street to Parsons avenue; on West Goodale street in a westerly direction, from High street to Neil ave-

nue; thence on Neil avenue in a northerly direction to Eleventh avenue; on Fourth street, from Livingston avenue, in a northerly direction to Wyandotte avenue; on Kelton avenue, from Main street, in a southerly direction to Livingston avenue; on Rose avenue, from Main street, in a northerly direction to Fair avenue; on Sandusky street, in a southerly direction from Broad street to Sullivant avenue; thence on Sullivant avenue, in a westerly direction, from Sandusky street to Glenwood avenue; on West Broad street, from a point opposite the center of the east driveway of the Central Hospital for the Insane (the same being the corporation line of the City of Columbus as established by an ordinance of the City of Columbus, passed on or about May 18th, 1890) to Hague avenue; on Main street in an easterly direction, from Rose avenue to Alum creek; on Oak street in an easterly direction, from Sherman avenue (formerly called Bruce street) to Fairwood avenue; on Cleveland avenue, from Buckingham street northerly to the north corporation — of said City of Columbus; on Neil street from Naghten street in a southerly direction to Spring street; thence on Spring street in a westerly direction to Front street; thence on Front street in a northerly direction to and over the Front street bridge across the railroad tracks; thence along Park street to Spruce street; thence westerly on Spruce street from Park street to Dennison avenue; thence on Dennison avenue southerly to Montgomery street; thence westerly on Montgomery street to Harrison avenue; thence on Harrison avenue, northerly, from Montgomery street to First avenue; thence on First avenue westerly, from Harrison avenue to Pennsylvania avenue; thence on Pennsylvania avenue in a northerly direction from First avenue to Fifth avenue; on Front street in a southerly direction, from Spring street to Fulton street; thence on Fulton street in an easterly direction to Parsons avenue; thence on Parsons avenue in a southerly direction to the south corporation line; on Town street from High street in a westerly direction to Front street; be and the same are hereby renewed to said The Columbus Railway Company, its successors and assigns, for and during the term of twenty-five years, from and after the passage of this ordinance; and the said The Columbus Railway Company is, and its successors and assigns are, hereby granted the franchise and right, and are hereby authorized and empowered to maintain and operate its lines of street railroad upon and over each and all of said streets and avenues, and parts of streets and avenues, aforesaid, for said period of twenty-five years, from and after the passage of this ordinance, upon and subject to each and every of the terms, conditions, stipulations and requirements hereinafter prescribed, and subject to the requirements of the general ordinances of the City of Columbus, Ohio.

### To Connect Tracks.

Sec. 2. The said The Columbus Railway Company shall connect its tracks on High street with the tracks of what was formerly known as The Columbus Central Railway, at the intersection of High street

and Spring street, at the intersection of High street and Town
21 street, and at the intersection of High street and Fulton street, so that said lines may be operated as one system, in order to better accommodate the public; and said company, shall have the right to connect, by suitable curves, tracks and appliances, its tracks at any points where they now intersect, or may hereafter intersect, at any time while this ordinance remains in force, under the direction and supervision, and according to plans and specifications to be approved by the Board of Public Works; and may maintain feed wire lines on any streets or avenues where they are now located, and elsewhere when needed, under like direction and supervision, and under plans to be approved by said board.

Provided, further, that said railroad company, in operating its lines of cars, shall make no change in the routes as now operated by it unless such change shall be first approved by resolution of the City Council of said city.

## Street Repairs and Improvements.

Sec. 3. The said The Columbus Railway Company, shall keep in repair all that portion of said streets and avenues included within lines drawn one foot on the outside of the outer rails of its tracks; and shall pay for the cleaning, sweeping and sprinkling of said portion of the public way occupied by it and one foot on the outside of its outer rails, at the same rate and in the same manner required of abutting property owners for the residue of the public ways adjacent to said strip. If the City Council at any time orders the improvement of the roadway of any of said streets and avenues, by laying down thereon a pavement of any kind, said company shall, at its own expense, improve that portion occupied by its tracks and one foot on the outside thereof, with the same character of materials; or, if
22 on the said streets or avenues a pavement has already been laid, and an assessment therefor placed on the tax duplicate, said company shall pay to the Director of Accounts of the City of Columbus, Ohio, such portion of the assessment for said improvement as the space occupied by said tracks and one foot on the outside of the outer rails bears to the entire width of the improved roadway; such sum to be by the Director of Accounts paid to the City Treasurer, and by him to be credited to any portion of the assessment made for the cost of such improvement, remaining due from, and unpaid by, the several abutting property owners; provided, that if in any case the amount so paid shall exceed the unpaid assessments, the excess shall be by the Director of Accounts paid to the abutting property owner entitled thereto.

## Pavements.

Sec. 4. The pavements provided for in this ordinance shall be laid at such height or grade as may be fixed or determined by the Board of Public Works, and shall, during the existence of this ordinance or grant, or any extension, amendment or renewal thereof, be kept in

repair under the direction and supervision of such officers as may be from time to time vested by law or ordinance of the City Council with the control and supervision of the Public Highways and Works of said city; and on the failure of the company to make said repairs within thirty (30) days after receiving notice so to do from the City Council, the City Council may make the same or cause the same to be done, and said City of Columbus shall collect all the cost and expense thereof from said company, and the entire amount of such
23 cost and expense shall constitute a lien and charge upon the property and franchise of said company the same as if formally levied and assessed as in the case of other municipal improvements. Whenever the said railroad is *bring* put down on any unimproved street or streets, said company shall grade the street or streets from curb to curb at its own expense on a level with its tracks.

## Damage Indemnity.

Sec. 5. Said Railway Company shall, at all times hereafter, defend, indemnify and keep harmless the City of Columbus from any and all damages, lawful claims and demands for injuries to persons or property, the cost and expense of which said city may be subjected to or made liable for, by any proceedings at law or in equity, or otherwise, growing out of the grant of the privileges in this ordinance granted or out of the exercise or enjoyment of the same by said company, or out of the failure of said company to construct and keep in repair the pavement or other improvement by it herein required, or authorized, to be constructed and maintained; and said company may, at its own cost defend against such actions, either in its own name or in the name of the City of Columbus.

## Temporary Track Removals by City.

Sec. 6. The said City of Columbus shall have the right to temporarily remove or obstruct, or authorize the same to be done, any portion of the railroad tracks of said company, whenever and wherever it shall be necessary in laying down or repairing water pipes,
24 gas pipes, sewers, drains, gutters or cisterns, or to use hose or any other apparatus necessary to be used in extinguishing fires, or any other public work or improvement required to be done by said city, not disturbing the running of cars where it can be avoided, without incurring any liability for damage to said company.

## Speed and Control of Cars.

Sec. 7. Said company shall at all times conform to such reasonable rules and regulations as are, or may hereafter be prescribed by ordinance, as to the rate of speed it may run its cars; and when its cars are about to start, and when in motion, if reasonable cause therefor exist, warning shall be given by gong or otherwise, to notify persons of immediate or approaching danger? No car shall be started or put in motion while any passenger is in the act of entering the same or

alighting therefrom. Cars running in the same direction shall not approach nearer to each other than one hundred feet, unless from unavoidable necessity or on switches or turnouts. Gongs shall be sounded as a warning on all cars approaching each other from opposite directions, and on each car approaching street intersections, which the car is to pass from one street to another, where there are buildings to prevent persons on foot or persons in other vehicles on the street from seeing the approaching car; the warning last aforesaid to be given at a distance of not less then fifty feet from such street corner and from time to time until the car reaches such intersection.

25 Sewer and Water Pipes.

Sec. 8. The said City of Columbus shall not be liable in any way to said company for damages it may sustain from the breaking, or overflow of waters from, any sewer or drain, or from the breaking of any water pipe or gas pipe by reason of any change in the grade of said streets; and said company shall so construct its tracks as to fully protect from damage thereby any and all sewers, water pipes and mains, gas or other pipes running beneath the surface of the streets.

Snow and Ice.

Sec. 9. In case it becomes necessary for said company to remove snow and ice from its tracks on said streets, it shall not be left in such manner as to interfere with or impede travel or render the street dangerous.

Conductors and Motormen—Exercise of Caution.

Sec. 10. The conductors in charge of cars shall not allow any lady or child to enter or leave any car while in motion; and the conductors and motormen shall keep a vigilant watch for all teams, carriages, persons and obstructions upon or near the track, and upon first appearance of danger, shall give warning and stop the car if necessary, to prevent accident; and the motormen must always be on the front platform while the car is in motion.

Motive Power and Safe Equipment.

Sec. 11. Permission is hereby given said company to operate
26 its entire lines of street railroad with any and all extensions that may hereafter be made thereto, by electricity, or such other motive power, other than animal or steam power, as shall be acceptable to the city. Said company shall have the right to erect and maintain iron or wood poles, painted and neat in appearance, wires, fixtures and conduits, and any and all other appliances, or appurtenances that in the opinion of the city shall be found necessary. At and after dark all cars running shall be lighted and provided with suitable signal lights. All cars shall be kept clean, and when the

tempera ure is below 35 degrees Fahrenheit, shall be heated. No car shall be allowed to remain standing upon the line of any route for passengers or any other purpose so as to impede any other vehicle, but shall be subject to such police regulations as are or may be prescribed for any other vehicles so far as they may be applicable. No car or cars shall be used on such railroad if worn out, broken, or so constructed, or kept in such a condition as to imperil the lives, limbs or health of the passengers; provided, that if any time during the life of this grant or any extension thereof, said city shall require, by ordinance, all trolley wires or other electric wires in the principal business dis rict of said city to be placed in conduits under ground, said company shall within a reasonable time after the passage of such ordinance, which time shall be fixed by said city, place all its trolley wires, and feed wires within said district, under ground.

## Wires and Poles.

Sec. 12. In the erection or placing of wires or conduits and in the use of any and all other appliances and appurtenances found necessary to operate said company's lines of railroad, a plan of the
27 same, showing all poles, wires and other appliances or appurtenances that said company shall, desire to use, shall be submitted to and approved by the Board of Public Works. Said city shall have the right to fix the height of all wires and poles above the street, and the size and location of all poles and conduits in the street, to determine the places in the stree s where any and all tracks, appliances and appurtenances shall be located, and to establish such regulations with reference to the Public Safety and protection as the city shall from time to time deem necessary and proper.

## Interurban Lines.

Sec. 13. The said city hereby reserves the full right and power at any time during the life of the grant herein made to grant to any other company, corporation or individual, engaged in operating an interurban railroad to jointly use with said The Columbus Railway Company any track or part -hereof owned or operated by said The Columbus Railway Company, which may be necessary to enable the cars operated on such interurban railroad to pass by the most direct route to and from High street, if said cars shall enter said city west of High street, and to and from High street if said cars shall enter said city east of said High street, and to and from Chestnut street, if said cars shall enter said city north of Chestnut street and to and from Town street, if said cars shall enter said city south of Town street, upon equitable terms of payment therefor to said The Columbus Railway Company, taking into consideration the value, cost of
28 construction and maintenance of the track or tracks and over head construction so jointly used, the amount paid by said The Columbus Railway Company, its predecessors, successors and assigns, whether to said city or to abutting property owners, for street paving and the cost of maintaining the same upon such street

or streets so occupied, the pro rata amount of taxes and assessments paid on such track or part thereof, and the cost of power used in operating such interurban cars. If such right to joint use be granted by said city and if terms of compensation therefor cannot be agreed upon by said The Columbus Railway Company and the corporation, company or individual applying for such joint use, within sixty days after such grant is made by said city, the terms of compensation therefor shall be submitted to arbitration, one arbitrator to be chosen by said The Columbus Railway Company, one by the corporation, company or individual applying for such joint use, these two to select a third arbitrator. The decision of said arbitrators, in the absence of fraud, accident or mistake of law or fact, shall be conclusive on both parties. But neither such arbitration nor any appeal therefrom shall in any way delay such joint use and occupation, when so granted as aforesaid, provided such grantee of the right to such joint use shall first secure to the satisfaction and acceptance of said The Columbus Railway Company the payment of the compensation which may be awarded by said arbitrators. No interurban cars shall be operated over any track or tracks, or parts thereof of said The Columbus Railway Company under and by virtue of the foregoing provision of this ordinance authorizing said city to compel such joint use, more frequently than one car each way every thirty minutes. Said The Columbus Railway Company is hereby authorized and em-
29 powered to make and carry out contracts or traffic arrangements, for the use of any of its tracks or any part thereof, by interurban cars of a g*u*age different from that of its own cars, and, with the consent of said city to permit the laying and the use of a third rail for said purpose; but it shall not permit such joint use or the laying of such third rail except over such route as may be necessary to enable such interurban cars to reach, and return from, the tracks now known as the interurban loop as now existing or hereafter modified. It is intended and understood that the phrases "interurban cars" and "cars operated on such interurban railroads" refer to and mean only such cars as shall be operated at regular intervals between said City of Columbus and some other city, or some village, at least ten miles distant from the limits of said City of Columbus, where such interurban cars enter the same. Any grant or traffic arrangement made by said The Columbus Railway Company to any other corporation, company or individual, to use any of its tracks or any part thereof, shall be subject to all rules and regulations of said city now in force, and all reasonable rules and regulations which may hereafter be adopted by said city, concerning the rate of speed and headway, and the operation, character, lighting and heating of all cars so operated under such grant or traffic arrangement for such joint use, and for the comfort and safety of passengers carried thereon.

Interurban Passenger and Freight Cars.

Sec. 14. Neither said The Columbus Railway Company nor any other person, company or corporation which may hereafter ob-

tain the right to use any of its track or tracks, shall move
30 along or over the same any passenger cars in trains of more than three cars per train, including the motor car.

Freight cars shall not be moved along or over the whole or any part of the tracks of the said The Columbus Railway Company in said city, except upon the streets and avenues or parts of streets and avenues hereafter designated by ordinances which may hereafter be passed by the City Council of said city granting such permission; provided, however, that said company may transport over any of its lines, material to be used by it in construction of repairs and extensions.

## Conductors and Mortormen—Duties.

Sec. 15. At all times when any car is in use a motorman in charge of such car shall be stationed on the front platform of the motor car; and there shall be a conductor on each car, whose duty it shall be to collect fares and to look out for the safety and comfort of passengers.

## Electrolysis.

Sec. 16. In the construction of its trolley wires, said company shall safeguard the water pipes, and any other system of iron pipes which may be maintained by said city, by using what is known as the "double trolley system," or such other device, to be approved by the Board of Public Works, as shall effectually protect such pipes from injury by electrolysis.

## To Expend a Million Dollars.

Sec. 17. Said company shall, as rapidly as the requirements
31 of its railroad system and the efficient service of the public demands, during the life of this grant, expended not less than $1,000,000.00 in extensions and betterments, and shall, at all times during the life of this franchise, furnish, upon all its lines, efficient and adequate service and a sufficient number of first class, commodious cars for the accommodation of its patrons. The City Council of said city may, by ordinance, require such reasonable extensions of such of the lines operated by said company as may be necessary for the efficient operation of such railroad and for the convenience of the public, whenever along the line of any such proposed extension and between parallel lines four hundred feet distant on each side thereof, there shall be when such extension is ordered, not less than one hundred and fifty separate buildings, used and occupied as dwellings, per mile or in like proportion for any less distance; but said company shall not be required to construct more than one mile of extensions within one calendar year.

It is expressly provided that any and all franchise rights to operate extensions which may hereafter be granted to said company, shall expire at the expiration of said period of twenty-five years.

## Grooved Rails and Kind of Pavement.

Sec. 18. In making extensions on paved streets, and in relaying tracks on paved streets, grooved or other modern and improved rails of weight and pattern to be approved by the Board of Public Works of said city shall be laid; such rails shall be laid upon foundations of concrete or other material, and according to plans to be approved by said board.

32 Whenever any unpaved street, or any part of any street, along which said company operates lines of street railroad, shall hereafter be improved by laying down thereon a pavement, said company shall relay its tracks thereon in the manner aforesaid, and shall pave the portion of such street as provided in sections 4 and 5 of this ordinance.

## Cash Deposits for City Repairs.

Sec. 19. Said company shall keep on deposit with the said city at all times the sum of one thousand dollars as an emergency fund, against which the city may draw, upon vouchers drawn by the Director of Accounts, with the approval of the Board of Public Works, for the cost and expense of any repairs made by said city, which, by the terms of this ordinance, should have been made by said company, and which said company after due notice and reasonable opportunity has failed or neglected to make within the time prescribed by this ordinance; and said company shall at once replace any portion of said fund, expended as aforesaid so as to keep on deposit at all times the amount of one thousand dollars; and at the expiration of the time granted by this ordinance any sum remaining in said fund due to said company shall be refunded.

## Perpetual Franchises.

Sec. 20. The grants and provisions hereinbefore made and contained for the renewal of the franchise of the said The Columbus Railway Company on the streets and avenues hereinbefore mentioned in section 1 of this ordinance, shal in all respects apply to the grants, rights, privileges and franchises of the predecessors in

33 title of said The Columbus Railway Company, to construct, maintain and operate lines of street railway on Main Street, (formerly called Friend Street) from High street to Rose avenue; on State street from High street to Grant avenue; thence in a northerly direction on Grant avenue to Oak street; thence on Oak street in an easterly direction to Sherman avenue, (formerly called Bruce street); on Long street from High street in an easterly direction to Mulberry street, and thence in a southerly direction on Mulberry street from Long street to Broad street; on Cleveland avenue in a northerly direction from Long street to Mt. Vernon avenue; thence in an easterly direction on Mt. Vernon avenue to Washington avenue; on West Broad street from High street to a point opposite the center of the east driveway to the Central Hospital for

the Insane, (the same being the corporation line of the City of Columbus as established by ordinance of the City of Columbus, passed on or about May 18th, 1890); on Glenwood avenue in a southerly direction from Broad street to the Harrisburg pike; thence in a southwesterly direction on the Harrisburg pike to Green Lawn cemetery; as fully as if the routes and streets and avenues mentioned in this section were specifically mentioned and included in the first section of this ordinance, if, and so far as, the franchises in the streets and avenues mentioned, in this section or either of them or any part thereof shall hereafter be judicially declared by a court of competent jurisdiction, or by any appellate court to which any suit brought to test any or all of said franchises shall be brought, may be carried by proceedings in error or on appeal, not to be franchises in perpetuity.

It is expressly provided that nothing contained in said
34 ordinance is intended, nor shall anything herein be construed to be, a concession by said City of Columbus of the validity of any claim of said company to perpetual franchises to operate lines of street railroad in all or any of the streets and parts of streets named in this section.

It is further expressly provided, that nothing contained in this ordinance shall be pleaded or considered to be a bar to any suit or suits which may hereafter be brought in any court or courts of competent jurisdiction, seeking to test the validity of any claim or claims to said company to perpetual franchises to operate any line or lines of street railroad upon any of the streets or parts of streets mentioned in this section.

## Fares and Transfers.

Sec. 21. Said The Columbus Railway Company, its successors and assigns, shall be entitled to charge fares within the corporate limits of said city during the term herein provided at the following rates, and no more, to-wit: For a single cash fare, 5 cents; for tickets in packages of seven twenty-five cents, until the annual gross receipts from all fares received on all lines operated by said company within said city amount in the aggregate to the sum of one million seven hundred and fifty thousand dollars ($1,750,000.00) and after said annual receipts amount to said sum, for tickets in packages of eight, twenty-five cents, all of which tickets shall be good for use from the time the regular cars start in the morning until the regular cars quit running at or shortly after midnight; for single fares between the hours when regular cars quit running at or shortly after
35 midnight until such cars commence running in the morning, during the first five years of the term granted by this ordinance, ten (10) cents, and thereafter five (5) cents.

No charge shall be made for children under six years of age attended by parent or other person. Children over six years of age and under ten years of age shall be carried for 3 cents each.

Tickets for the rates required by this ordinance shall be kept on sale and sold at the principal office of said company in the City of Columbus during business hours and at all times by conductors on

the regular cars of said company at the rates for tickets aforesaid. For each cash fare and for each ticket said company shall, on demand of the passenger tendering the same, issue to such passenger a transfer slip good for one continuous passage in said city on any other line of street railroad owned or operated by said company which connects with, diverges from, or crosses, the line on which said transfer was issued, if presented within fifteen minutes after the time designated by punch marks on transfer slip, which time so designated shall be a reasonable arriving time of car at any one of the transfer points of the line by which such transfer was issued.

For each five cent cash fare said company shall, on demand of the passenger tendering the same, issue to such passenger a transfer slip good for one continuous passage over any other line of electric railway now constructed or hereafter constructed or operated in said city by any person, company or corporation, other than The Columbus Railway Company, whose charge for transfer slips is not less than that of said The Columbus Railway Company, and
36 whose line of railroad connects with, diverges from, or crosses any line of road of said The Columbus Railway Company; provided, that the company, corporation or person operating such other line as aforesaid shall be required by said city to accept said transfer slips for such passage, and to exchange transfers with said The Columbus Railway Company; and said The Columbus Railway Company shall be required to accept, from all passangers, transferred from such lines of other roads, similar transfer slips good for continuous passage over its lines in said city, if presented in the time above provided; and the receipts from the passengers purchasing such transfer slips, so issued as aforesaid by said The Columbus Railway Company, and by any other person, company or corporation, operating lines which cross the same or connect therewith, shall be equally divided between the operators of said lines of railroad respectively.

No free transportation shall be furnished except to officers and employes of the said railroad company, and, when permitted by law, to policemen and firemen of said city wearing their official uniform.

## All Night Cars.

Sec. 22. Between the hours of 5:30 a. m. and 12 o'clock midnight cars shall be run at intervals not to exceed the following, viz: High street, between north and south corporation lines, 10 minutes; Schiller street and High street, to north corporation line, 10 minutes; Long street, 6 minutes; Main and Neil avenue, 6 minutes; State and Oak streets, 7 minutes; Livingston avenue and Fourth street, 10 minutes; Leonard avenue and Camp Chase, 11 minutes; Mr. Vernon avenue and cemetery, 11 minutes; Central mar-
37 ket line, 15 minutes; Pennsylvania and Parsons avenue, 19 minutes. Between the hours of 12 o'clock midnight and 5:30 o'clock a. m., cars shall be run, starting at 1 o'clock, a. m. and continuing until 5 o'clock a. m., hourly upon High street, West Broad street, and on two lines to be hereafter designated by said city, running easterly from High street.

## Expiration.

Sec. 23. Upon the expiration of the term of the renewal franchise herein granted said company shall, unless a further renewal be granted by said city, remove all its tracks, wires and other appliances from the streets and avenues of said city and leave the portion of each and every street occupied by its lines in good condition, corresponding in finish and material with the remainder of such streets and avenues.

Sec. 24. The terms "the city" and "said city" whenever used in this ordinance, unless the context clearly indicates a different intention, are intended and shall be construed to mean The City of Columbus, Ohio; and the terms "the company" and "said company" and "The Columbus Railway Company" whenever used in this ordinance, unless the context clearly indicates a different intention, are intended and shall be construed to mean The Columbus Railway Company, its successors and assigns.

Sec. 25. If at any time in the future the laws of Ohio shall be so amended as to do away with the Board of Public Works as now constituted by law, then and in that event the powers and duties herein conferred upon and required of the Board of Public Works shall be performed by such city officer or board as shall, by law, be entrusted with the duties and powers now performed by such board. 38–39 If in the future the laws shall be so amended as to do away with the Director of Accounts of said city as now constituted by law, then the powers and duties conferred upon the Director of Accounts under this ordinance shall be exercised by such officer of the city as shall by law succeed to his powers and duties.

## Repeal and When in Effect.

Sec. 26. The provisions of any and all ordinances and resolutions, and parts of ordinances and resolutions, heretofore passed or adopted by the City Council of said city, which is inconsistent with the terms of this ordinance, are hereby repealed and rescinded.

Sec. 27. This ordinance shall take effect and be in force from and after its passage and legal publication, and the filing by said The Columbus Railway Company, with the City Clerk of said city, of its acceptance in writing of each and all of the terms, provisions and requirements of this ordinance; provided, however, that if said company shall fail to file such written acceptance within thirty days after the passage of this ordinance, then this ordinance shall be void and of no force and effect, but if said company shall be prevented from accepting the terms, provisions and requirements of this ordinance by injunction or other judicial or legal process, or if its acceptance thereof shall be delayed or postponed in the manner or by the means aforesaid, said Company may accept the terms, provisions and requirements of said ordinance at any time within thirty days after the expiration of the period during which said acceptance shall

have been prevented or delayed as aforesaid, in which event
40 said acceptance shall have the same effect as if the same had been filed within thirty days after the passage of this ordinance.

Passed. February 4, 1901.

JAMES J. THOMAS,
*President of the City Council.*

Approved by the Mayor, February 6, 1901.
Attest:
JOHN T. BARR,
*City Clerk.*

41 EXHIBIT No. 2.

An Ordinance, No. 17802,

Granting permission to The Central Market Street Railway Company, its successors and assigns, to construct, operate and maintain a single or double track street railway, with necessary sidetracks, curves, turn-outs and switches in the following streets of the City of Columbus, Ohio, towit: Rich Street, Fifth Street, Donaldson Street, Livingston Avenue, Mohawk Street, Reinhard Avenue, Jaeger Street, Hanford Street, Fourth Street, Hosack Street, Innis Avenue and Parsons Avenue to the south corporation line of said City of Columbus.

(City Record Book 11, Page 516.)

Whereas, Application has been made in writing to the Board of Public Works, and the City Council of the City of Columbus, Ohio, for a franchise to construct, operate and maintain a street railway upon Rich street, Fifth street, Donaldson street, Livingston avenue, Mohawk street, Reinhard avenue, Jaeger street, Hanford street, Fourth street, Hosack street, Innis Avenue and Parsons avenue, to the south corporation line of the said city; and

Whereas, Notice of said application has been published according to law; and

Whereas, Bids have been advertised for and received by said city for the construction of a railroad upon said streets as required by law; and

Whereas, The Central Market Street Railway Company bid and agreed to carry passengers upon said proposed railroad along said route at a lower rate of fare than any other bidder; and

Whereas, The consent in writing of the owners of the majority of the feet front of the lots and lands fronting and abutting upon said parts of said streets has been obtained and filed with the Clerk of said city for the construction, operation and maintenance
42 of said street railroad. Now therefore,

Be it ordained by the City Council of the City of Columbus, Ohio, as follows, towit:

Section 1. That The Central Market Street Railway Company, its successors and assigns, be and is hereby granted permission and authorized to construct, operate and maintain a street railway in and upon the following streets in the city of Columbus, Ohio, towit: In Rich street from Third street to Fifth street; in Fifth Street from Rich street to Donaldson street; in and across Donaldson street and Livingston avenue to Mohawk street, in Mohawk street from Donaldson street and Livingston avenue to Reinhard avenue; in Reinhard avenue from Mohawk street to Jaeger street; in Jaeger street from Reinhard avenue to Hanford street; in Hanford street from Jaeger street to Fourth street; from Hanford street to the south corporation line of said city; in Hosack street from Fourth street to Parsons avenue; in Innis avenue from Fourth street to Parsons avenue; in Parsons avenue from Innis avenue to the south corporation line of said city in accordance with the provisions of this ordinance; with permission to connect the track or tracks on said streets with each other, and with the track or tracks of The Columbus, London and Springfield Railway Company, and The Columbus, Buckeye Lake and Newark Traction Company at Rich and Third streets, by means of a curve or curves.

Sec. 2. Said grantee and assigns shall have the right to lay down a single or double track on the route described in section 1 of this ordinance, with switches and turn-outs, wherever switches and turn-outs may be necessary or convenient, and to connect said track or tracks by curve or curves with its other track or tracks, and with the tracks of the other intersecting standard gauge street railroads within the city limits of Columbus, Ohio.

43 A plan showing the location of such switches, tracks and turn-outs shall be submitted to the Board of Public Works of said city and approved by it, before the construction thereof.

Sec. 3. That said track shall be of a standard gauge of four feet and eight and one half inches in width, and on paved streets the rails shall be standard patterns, grooved rails, not less than 70 pounds to the yard, to be approved by the Board of Public Works, and upon such foundation as said Board shall direct. The space between the inner rails where the double tracks are laid shall not exceed five feet, measured from rail to rail.

Sec. 4. Said grantee, its successors and assigns, shall keep in repair all that portion of said streets and avenues which is included within lines drawn one (1) foot outside of the outer rails of its said tracks; and shall pay for the cleaning, sweeping and sprinkling of said portion of the public way occupied by it, and one foot on the outside of its outer rails, at the rate and in the same manner required of the abutting property owners for the residue of the public ways adjacent to the said strip. If the City Council at any time orders the improvement of the roadway of any of said streets, avenues or alleys by laying down thereon a pavement of any kind, or a macadam roadway, said company shall, at its own expense, improve that portion occupied by the tracks of said road and one foot outside thereof with the same character of material as is used on the remainder of the street, and shall relay its or their tracks on any street or streets so paved with

grooved rails on foundations as specified in section 3 hereof; or if on any of the said streets or avenues a pavement has already been laid, and an assessment therefor placed on the tax duplicate, said company shall pay to the Director of Accounts of the city of Columbus, Ohio, a proportion of the present value of the pavement covered by the assessment for said improvement as the space occupied by said tracks and one foot on the outside of the outer rails thereof bears to the entire width of the improved roadway. Such sum to be by the Director of Accounts paid to the City Treasurer, and by him to be credited to any portion of the assessment made for the cost of such improvement, remaining due from, and unpaid by, the several abutting property owners. Provided, that if in any case the amount so paid shall exceed the unpaid assessments, the excess shall be by the Director of Accounts paid to the abutting property owner entitled thereto. The present value of the street paving referred to in this section to be determined by the Board of Public Works in consultation with the officers of said railway company, and in case a satisfactory price cannot be agreed upon the matter is to be settled by arbitration according to the provisions of the Revised Statutes of Ohio.

Sec. 5. The pavement provided for in this ordinance shall be laid at such height of grade as may be fixed or determined by the Board of Public Works, and shall, during the existence of this ordinance, or grant, or any extension, amendment, or renewal thereof, be kept in repair under the direction, or under the supervision and direction of such officers as may be from time to time vested by law, or ordinance of the City Council, with the control and supervision of the public highways and works of the city, and on the failure of the company to make said repairs within thirty (30) days after receiving notice so to do from the Board of Public Works, the said board may make the same, or cause the same to be done, and the said City of Columbus shall collect all the cost and expense thereof from said company and the entire amount of such cost and expense shall constitute a lien and charge upon the property and franchise of said company, the same as if formally levied and assessed as in the case of other municipal improvements. That whenever the said railway is being put down on any improved street or streets said grantee and assigns shall grade the street from curb to curb at its own expense, and on a level with its tracks.

Sec. 6. Said grantee and its assigns shall at all times hereafter defend, keep harmless and indemnify the city of Columbus from any and all damages, lawful claims, and demands for injuries to persons or property, cost and expenses to which said city may be subjected or made liable by any proceeding at law or in equity growing out of the grant of the privileges in this ordinance granted, or out of the exercise or enjoyment of the same by said grantee and its assigns, or out of the failure of said grantee and assigns, to construct or keep in repair the pavement or other improvements by them herein required to be constructed and maintained; and said grantee or its assigns may, at its own cost, defend against such action, either in its own name or in the name of the City of Columbus.

Sec. 7. The said city of Columbus shall have the right to remove

or obstruct, or authorize the same to be done, any portion of said railroad track wherever it shall be necessary in laying down or repairing water pipes, gas pipes, sewers, drains, gutters or cisterns or by hose or any other apparatus necessary to be used in extinguishing fire, or any other public work or improvement required to be done by said city, not disturbing the running of cars where it can be avoided, without incurring any liability for damage to said grantee.

Sec. 8. The said city of Columbus shall not be liable in any way to said grantee or its assigns, for damages it may sustain from the breaking or overflow of water from any sewer or drain, or from the breaking of any water pipe or gas pipe, or by reason of any change in the grade of said streets, and said grantee and assigns shall so construct the track as to fully protect from damage thereby any and all sewers, water pipes and mains, gas or other pipes running
46 beneath the surface of the streets. Whenever the surface drainage of any street (whether improved or unimproved) be obstructed by the laying of said track the said grantee or its assigns shall construct all catch basins and pipe lead-offs, or relay so much of the paved roadway of said street at its or their expense, as in the opinion of the said Board of Public Works may be necessary to overcome the effects of such obstruction.

Sec. 9. In case it becomes necessary for said grantee and its assigns to remove the snow and ice from the tracks on said streets, it shall not be left in such a manner as to interfere with or impede travel or render the streets dangerous.

Sec. 10. The conductors, drivers or motormen of cars shall not allow any woman or child to enter or leave any car while in motion, and shall keep vigilant watch for all teams, carriages, persons and obstructions upon or near the track, and upon the first appearance of danger thereto, shall give warning and stop the car, if necessary, to prevent accident, and either the driver, conductor or motorman must always be on the front platform while the car is in motion.

Sec. 11. No car shall be run at a greater rate of speed than twelve miles an hour. Cars driven in the same direction shall not approach nearer to each other than one hundred feet, unless from unavoidable necessity, or on switches or turn-outs. Said grantee and assigns shall at all times conform to such general rules and regulations as may from time to time be made by the council as to the rate of speed it may run its cars, and while the cars of said grantee and assigns are in motion or about to start, warning shall be given by bell or otherwise, to notify persons of any immediate or approaching danger.

Sec. 12. Permission is hereby given said grantee and its assigns to operate its entire line of street railway with any and all exten-
47 sions that may hereafter be made thereto, by electricity or other motive power, other than animal or steam power, as shall be acceptable to the city for such purposes. Said grantee and its assigns shall have the right to erect and maintain iron or wood poles, painted and neat in appearance, wires, fixtures and conduits, and any and all other appliances or appurtenances that in the opinion of said city shall be found necessary. At and after dark, all cars running shall be lighted and provided with suitable signal lights, and

cars shall be kept clean, and when the temperature is below 35 degress Fahrenheit, shall be heated. No car shall be allowed to remain standing upon the line of said route for passengers or any other purpose, so as to impede any other vehicle, but shall be subject to such police regula ions as are, or may be, prescribed for other vehicles, so far as they may be applicable. No car or cars shall be used on such railroad if so worn, broken or constructed, or kept in such condition as to imperil the lives, limbs or health of the passengers; provided, that if at any time during the life of this grant or any extension thereof said city shall require by ordinance all trolley wires or other electric wires in the principal business district of said city to be placed in conduits under ground, said grantee and its assigns shall within a reasonable time after the passage of such ordinance, and which time shall be fixed by said city, place all its trolley and feed wires within said district under ground. In the construction of its system of trolley wires said company and its assigns shall guard against injury to the water and other pipes of said city from electrolysis by the use of what is known as the "double trolley system" or such other device as may be approved by the Board of Public Works for that purpose.

Sec. 13. In the erection and placing of wires or conduits and in the use of any and all other appliances or appurtenances found
48 necessary to operate its line, a plan of the same, showing all poles, wires and other appliances or appurtenances that said grantee and its assigns shall desire to use, shall be submitted to and approved by the Board of Public Works. Said city shall have the right to fix the height of all wires and poles above the street, the size and location of all conduits in the street, and the distance at which poles shall be apart, and to regulate the places within the street where any and all tracks, appliances and appurtenances shall be located and to establish such regulations with reference to public safety and protection as the said city shall from time to time deem necessary and proper.

Sec. 14. Cars shall be run by said grantee, and its assigns, at no longer intervals than fifteen minutes, unless prevented by unavoidable casualty, and shall be operated regularly between 8 a. m. and 10 P. M. on Sundays, and between 5:30 a. m. and 11:30 p. m. on all other days; and said grantee and its assigns shall not run a train of more than three cars, including the motor, on any of its lines in said city.

Sec. 15. The Central Market Street Railway Company, and its assigns, shall be entitled to charge fares as follows, and no more: For single fare within the corporate limits of said city, five cents; for seven tickets, twenty-five cents. No charge to be made for children under six years of age, attended by parents or other person in charge of them. Children over six and under twelve years of age shall pay three cent fares. For each five cent fare said company and its assigns, shall on demand, at the time of payment of said fare, issue a transfer slip good for continuous passage within said city, over any line of railway connecting with or intersecting its line of railway, now or hereafter built, if presented within twenty minutes after leav-

ing the car of the issuing company, providing said transferee line be required by said city to accept such transfer slip for such
49 passage. And the said The Central Market Street Railway Company, and its assigns, shall be required to accept from any such connecting or intersecting line, similar transfer slips, which shall be good for immediate continuous passage over its line within said city of Columbus. The fares paid, for which such transfers are issued, shall be divided equally between the operators of the two connecting or intersecting lines of railways over which said fares are paid.

Sec. 16. Said grantee and its assigns, shall have the right to carry passengers, United States mail, packages, express matter, baggage and freight, on its said lines in said city of Columbus, but shall not have the right to move along its lines within the business district of said city any steam railroad freight or passenger cars, and all cars of said company and its assigns carrying packages, express matter, baggage and freight, shall be loaded and unloaded in a depot or a place to be hereafter designated by said company and its assigns on lands abutting on its said line, and shall have the right and permission to put in proper curves, switches and tracks on said streets and avenues from its said lines to its said depot across the sidewalk in front thereof to said depot at any point along its said line in said city of Columbus. Said company or its assigns may selec for its use in loading, unloading and storing all kinds of freight and its cars, except live stock, and shall have the like right and permission to put in proper curves, switches and tracks on said streets and avenues from its said lines to said depot across the sidewalk in front thereof, at any point along its said lines in the said city of Columbus.

Sec. 17. Said The Central Market Street Railway Company or its assigns, shall have the right to connect its lines with the standard gauge loop in the central portion of said city, and shall have the right and permission to use and occupy said loop under the terms and
50 conditions contained in section 15 of ordinance No. 15,676, passed by the council of the city of Columbus, on the 23rd day of April, 1900, except that said company and its assigns shall only be required to run its said passenger cars over said loop, as required by this ordinance over its other lines within said city, and all the lines of said company and its assigns in said city shall be subject to all provisions contained in said section fifteen (15) of said ordinance No. 15,676 aforesaid.

Sec. 18. As a consideration for the grants herein made the said The Central Market Street Railway Company and its assigns shall pay to the city of Columbus the following per cent upon the gross receipts of said company for local passengers fares received within said city of Columbus, towit: two per cent of said fares, during the term of said franchise, provided that by "local fares" is meant only those fares for passengers transported entirely within the limits of said city and does not include any part of fares for passengers carried partly within and partly without said limits. Said payments shall be made annually at the beginning of each calendar year for the amounts earned during the preceding year, accompanied by a

statement of the gross receipts during said period from local fares, duly verified by the proper officer of said company and filed with the Director of Accounts.

The director of Accounts of said city, within 30 days immediately following the time of said payment, shall haave access during business hours, to the books of said grantee or assigns for the sole purpose of ascertaining the amount of local fares received by said grantee or its assigns for carrying said passengers within said city limits during such preceding year. Provided, however, that if at the beginning of any calendar year the said The Central Market Street Railway Company, and its assigns, shall notify said city of Columbus that
51 it will, and shall thereafter sell tickets for one passage upon its road in Columbus, Ohio, at the rate of eight tickets for 25 cts. and 33 tickets for one dollar, then said railway company shall be relieved from the further annual payments to said city under this section so long as it shall continue to sell tickets at such reduced rates.

Sec. 19. This grant is made and shall continue in force for the full period of twenty five (25) years from and after the 23rd day of April, 1900, and all franchises and grants to said grantee and its assigns for extensions of lines, turn-outs, switches, connections or additional lines of street railway connected with, or to be connected with the lines of street railway of said grantee and its assigns, authorized and permitted under this ordinance, shall be considered a part of the system of street railway hereby authorized, and shall expire and wholly terminate with the expiration of the franchise and grant authorized under the terms of this ordinance.

Sec. 20. This grant is made upon the condition that said railroad shall be constructed and ready for operation within said city of Columbus within two years from the passage of this ordinance, and if not constructed and in operation within said time the grant herein and all rights thereunder shall thereupon and without any action on the part of said city, cease and determine. Provided that if said grantee and its assigns be delayed in the construction by injunction or other proceedings in court over which it has no control, the time it is so delayed by such proceedings shall not be counted as a part of the period within which said railway is to be constructed and made ready for operation, but said period for such construction and putting in readiness for operation shall be extended by adding to the period of two years aforesaid the length of time said company is so delayed by said causes.

Sec. 21. Upon the expiration of the term of twenty five
52 (25) years, provided by this ordinance, unless such grant has been renewed or extended by said city, the city of Columbus shall have the right by giving two years' notice in writing, before the expiration of said term of twenty five years, of its intention so to do, to purchase of the said grantee and its assigns so much of its lines of railway as then lies within the city at a purchase price to be fixed by three disinterested men, one of whom shall be selected by the city, one by said grantee or its assigns, and the third by the two so chosen; provided, that if said city shall not elect to purchase

said portion of said railway or shall not renew or extend said grant, then said grantee and its assigns shall within eight months from the expiration of said time remove the tracks, wires, poles and conduits and other properties from the streets so occupied by it, and shall leave the portions of the streets so occupied by them in good condition and repair. And if the said city elects to make said purchase the price fixed therefor shall be paid the said grantee or its assigns in cash before taking possession of said part of said railway, and within sixty days after said price is so fixed by said arbitrators; and in default of such payment within said time said option to cease and determine.

Sec. 22. The said city hereby reserves the full right and power to grant to any other company, corporation or individual, the right to jointly use all or any part or parts of said tracks with said The Central Market Street Railway Company and its assigns, and with each other upon equitable terms of payment to said The Central Market Street Railway Company, and its assigns, taking into consideration the value, cost of construction, amounts paid and repaid for street paving and other street improvements and the maintenance of the tracks so used and of the power used for operation.
53 In the event said terms cannot be agreed upon by said owning, succeeding or assignee company, and the party applying for said joint use within sixty days after application therefor following a grant for such joint use by said city, said terms shall be submitted to arbitration, one arbitrator to be chosen by said owner, successor or assignee, one by the party desiring to jointly use said tracks, and these two so selected to select the third arbitrator. The decision of said arbitrators in the absence of fraud, accident or mistake of law or fact, to be final and conclusive on both parties. But said city of Columbus reserves the right to fix and determine by ordinance the rules and regulations governing such joint use and occupation. Provided, that neither the arbitration herein mentioned nor any appeal therefrom, shall in any manner delay the joint use and occupation by any person, firm or corporation, which shall receive a grant thereof as aforesaid, with The Central Market Street Railway Company, under such rules and regulations as shall have been fixed by said city as aforesaid. Provided further, that said The Central Market Street Railway Company and its assigns, shall not have the right to grant to any other company, corporation or individual, permission to use any portion of its said tracks within said city without such permission having first been given by said city.

Sec. 23. The said city also reserves the right to grant to any other company, corporation or individual, permission to lay, on that part of Parsons avenue covered by this grant, at its or their own expense, any additional rail or rails, to be used by such company, corporation or individual in connection with the rail or rails, ties and roadbed of The Central Market Street Railway Company; the use thereof and the compensation to be paid to said The Central Market Street Railway Company and its assigns, for such use to be arrived at and determined by arbitration in the manner and with like effect

54 as provided by section 22 of this ordinance. Provided that the laying of such additional rail or rails shall be under the supervision and subject to the approval of the Board of Public Works of said city.

Sec. 24. The terms "The Central Market Street Railway Company," "said company," "the Grantee," and "the Company," wherever used in this ordinance, unless the connection clearly indicates a different intention, is intended, and shall be construed, to mean "The Central Market Street Railway Company and its assigns."

Wherever in this ordinance the term "the City of Columbus," "the city," or "said City" is used, said terms, unless the connection clearly indicates a different intention, is intended, and shall be construed, to mean "the city of Columbus, Ohio."

Sec. 25. This ordinance shall take effect and be in force from and after its passage and legal publication, and the filing with the City Clerk of said city by said company of a written acceptance of its terms and conditions, and the payment of said company of the cost of publication of this ordinance.

Passed January 21, 1901.

JAMES J. THOMAS,
*President of the City Council.*

Approved by the Mayor, January 22, 1901.
Attest:
JOHN T. BARR,
*City Clerk.*

55 EXHIBIT No. 3.

Columbus, Ohio, August 20, 1918.

To the City of Columbus, Ohio; George J. Karb, Mayor of said city; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Arthur P. Lamneck, Joseph C. Nailor, Edgar L. Weinland, and Fred P. Zimpfer, Members of the City Council of said City, City Hall, Columbus, Ohio:

The Columbus Railway Power and Light Company, hereinafter referred to as This Company, has for sometime past been operating its street railway lines in the city of Columbus under two certain franchises granted by said city, the first to The Columbus Railway Company for a term of twenty-five years by ordinance approved February 6, 1901, sometimes called and hereinafter referred to as the Blanket Franchise, duly transferred and conveyed by that company to this company by deed dated January 29, 1914, and the second to The Central Market Street Railway Company for twenty-five years by ordinance approved January 22, 1901, hereinafter referred to as the Central Market Franchise, duly conveyed, after foreclosure proceedings, to this company by deed dated March 1, 1907.

This company is the owner of certain other franchises previously granted to predecessors in title of The Columbus Railway Company

but duly transferred and conveyed by said company to this company by the deed aforesaid of January 29, 1914, which said franchises were granted without limitation of time and are perpetual. The streets covered by these perpetual franchises are set forth in Section 20 of said Blanket Franchise ordinance under the heading "Perpetual Franchises." Said section reads as follows:

"The grants and provisions hereinbefore made and contained for the renewal of the franchise of the said The Columbus Railway Company on the streets and avenues hereinbefore mentioned in
56 section 1 of this ordinance, shall in all respects apply to the grants, rights, privileges and franchises of the predecessors in title of said The Columbus Railway Company, to construct, maintain and operate lines of street railway on Main street, (formerly called Friend Street) from High street to Rose Avenue; on State Street from High street to Grant avenue; thence in a northerly direction on Grant Avenue to Oak street; thence on Oak street in an easterly direction to Sherman avenue, (formerly called Bruce street); on Long street from High street in an easterly direction to Mulberry street, and thence in a southerly direction on Mulberry street from Long street to Broad Street; on Cleveland avenue in a northerly direction from Long street to Mt. Vernon avenue; thence in an easterly direction on Mt. Vernon avenue to Washington avenue; on West Broad street from High street to a point opposite the center of the east drive way to the Central Hospital for the Insane, (the same being the corporation line of the city of Columbus, as established by ordinance of the city of Columbus, passed on or about May 18, 1890); on Glenwood avenue in a southerly direction from Broad street to the Harrisburg pike; thence in a southwesterly direction on the Harrisburg pike to Green Lawn cemetery; as fully as if the routes and streets and avenues mentioned in this section were specifically mentioned and included in the first section of this ordinance, if, and so far as, the franchises in the streets and avenues mentioned in this section or either of them or any part thereof shall hereafter be judicially declared by a court of competent jurisdiction, or by any appellate court to which any suit brought to test any or all of said franchises shall be brought, may be carried by proceedings in error or on appeal, not to be franchises in perpetuity.

"It is expressly provided that nothing contained in this ordinance is intended, nor shall anything herein be construed to be, a
57 concession by said city of Columbus of the validity of any claim of said company to perpetual franchises to operate lines of street railroad in all or any of the streets and parts of streets named in this section.

"It is further expressly provided, that nothing contained in this ordinance shall be pleaded or considered to be a bar to any suit or suits which may hereafter be brought in any court or courts of competent jurisdiction, seeking to test the validity of any claim or claims to said company to perpetual franchises to operate any line or lines of street railroad upon any of the streets or parts of streets mentioned in this section."

Under the provisions of the Blanket Franchise and the Central Market Franchise, this company has for a number of years been issuing and selling eight tickets for twenty-five cents and giving universal free transfers thereon, which represents a lower street railway fare than is in force in any city in the United States and is under present circumstances non-compensatory and confiscatory.

The street railway property of this company is worth more than twelve millions of dollars on any reasonable basis of investment or physical value. The bonds outstanding fairly chargeable against the street railway property amount to $7,225,000 on which the annual interest charge amounts to over $333,000. Under the law, this company is entitled to earn from the operation of its street railway lines a fair return upon the value of the property which it employs in furnishing street railway service to the people of the city of Columbus.

Recently the operating expenses of this company, as of all other street railway companies, have greatly increased, owing to the increased and increasing cost of all materials and supplies, in many instances more than one hundred per cent, and to the higher wages that all such companies have been required to pay to their
58 employes. The taxes and necessary replacement and other depreciation charges have also materially increased. Take, for example, the coal bill; in the year 1915, this company paid for coal required to operate its street railway lines the sum of $60,164; the bill, in the year 1916, was the sum of $81,354; and in the year 1917, the bill increased to the sum of $234,838. Also, the wage account of the railway employes of this company, in the year 1916, amounted to the sum of $806,336; but in the year 1917, it had increased to the sum of $887,994. These large increases in operating and maintenance expenses have resulted in corresponding decreases in the net earnings of this company. Its street railway net earnings for the twelve months ending June 30, 1918, after deducting operating expenses and taxes and setting aside a proper amount to represent depreciation, were only the sum of $301,987, which was not enough to pay the interest on the bonds outstanding properly chargeable against the street railway property of this company.

In the month of June, 1918, railway employes of this company demanded higher wages, and, after some negotiations, the controversy was submitted for arbitration to the National War Labor Board. By the decision of that Board, rendered July 31, 1918, the wages of the railway employes of this company were increased over fifty per cent, resulting in an increase of more than $560,000 over the highest amount ever paid by this company to its railway employes in any one year. With this increase, the wages required to be paid by this company to its railway employes will be more than $1,500,000 per year.

It will thus be seen, that although this company was not earning a fair return on its street railway property prior to the wage increase fixed by the National War Labor Board, the added burden of the Board's wage award will result in leaving this company without any

net earnings whatever. In fact, its gross earnings will fall
59 short by more than $250,000 of meeting its operating expenses, without allowing anything whatever for interest on its bonds, which interest must be paid.

This company is a public utility upon which the law imposes certain duties and obligations, including the duty of maintaining its property in good order and repair, so that it may render adequate and satisfactory service to the public. This company can not do this unless it receives sufficient revenue from the operation of its cars, which means that the rates must be adequate. The rates prescribed in those two franchise ordinances are inadequate and confiscatory, and all rights of the city and of the public thereunder are and must be subject and subordinate to the provisions of the Fourteenth Amendment to the Constitution of the United States prohibiting the State or any municipality therein from depriving this company of its property without due process of law, that is, in the present case, from forcing upon this company inadequate and confiscatory rates of fare.

On February 25, 1918, this company, appreciating the situation then existing, requested in writing the city council of the city of Columbus to authorize this company to charge higher rates, but this request was summarily refused. A later request for relief was also refused, notwithstanding the belief expressed by the Mayor and some members of the City Council that relief should be granted.

Increased revenue and proper compensation for service rendered are necessary in order that this company may continue to perform its public duties. And this fact was recognized by the National War Labor Board, which in its award granting large increases in the wages of this company's railway employe's said:

"This increase in wages will add substantially to the operating cost of the company and will require a reconsideration by the proper regulating authority of the fares which the company is allowed by
60 law to collect from its passengers. We make part of this award the words we have used in the Cleveland case: We have recommended to the President that special congressional legislation be enacted to enable some executive agency of the Federal Government to consider the very perilous financial condition of this and other electric street railways of the country, and raise fares in each case in which the circumstances require it. We believe it to be a war necessity justifying Federal interference. Should this be deemed unwise, however, we urge upon the local authorities and the people of the locality the pressing need for such an increase adequate to meet the added cost of operation."

And again that Board in its award said:

"In justice the public should pay an adequate war compensation for a service which can not be rendered except for war prices. The credit of these companies in floating bonds is gone. Their ability to borrow on short notes is most limited. In the face of added expenses which this and other awards of needed and fair compensation to the employes will involve, such credit will completely disappear. Bank-

rup cy, receiverships and demoralization, with failure of service, must be the result. Hence our urgent recommendation on this head."

This company must now refuse to continue the plan of issuing and selling eight tickets for twenty-five cents with universal free transfers, and now hereby surrenders, relinquishes and cancels the aforesaid Blanket Franchise and the aforesaid Central Market Franchise, and it will no longer operate its cars thereunder. It will hereafter consider and hold itself a tenant at sufferance in those streets which are not covered by its perpetual franchises, and it will withdraw from those streets whenever the city notifies it to do so. In order to give street railway service to the people of the city of Columbus, this company will continue to operate its street railway lines, but not
61 under said two franchises or either of them, upon all of the streets of the city until notified by it to withdraw from those streets not covered by the aforesaid perpetual franchises.

This company does hereby give further notice to the city that it will at once discontinue the sale of eight tickets for twenty five cents and the giving of universal free transfers and that it will hereafter charge five cents for a single ride and one cent for each transfer, transfer slips to be used at designated transfer points. In regard to the tickets heretofore sold and now outstanding in the hands of the public, this company will accept and honor them as heretofore.

Respectfully submitted by order of the Board of Directors,

THE COLUMBUS RAILWAY, POWER & LIGHT COMPANY.

By S. G. McMEEN, *President.*

62 And afterwards, to-wit: on the 16th day of September, A. D. 1918, came the Plaintiffs, by their solicitors, and filed in the Clerk's Office of said Court, their certain Motion for Temporary Restraining Order and Preliminary Injunction, which said motion is clothed in the words and figures following, to-wit:

*Motion for Temporary Restraining Order and Preliminary Injunction,*

In the United States District Court, Southern District of Ohio, Eastern Division.

No. 106.

I. TUCKER BURR, WINTHROP BURR, A. LAWRENCE PIERSON, Thomas B. Gannett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler, and William J. Sturgis, Partners Doing Business under the Firm Name and Style of Parkinson & Burr, Plaintiffs,

vs.

THE CITY OF COLUMBUS, OHIO, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Naiior, Edgar L. Weinland, Arthur B. Lamneck, and Fred P. Zimpfer, Members of the City Council of said City, Defendants.

Motion for Temporary Restraining Order and Preliminary Injunction.

The plaintiffs in the above entitled suit now hereby move the court to grant it, pending the suit, a temporary restraining order and preliminary injunction against the defendants, and each of them, their officers, servants, employes and agents, and their respective successors in office, as prayed for in the bill of complaint herein.

WILLIAM O. HENDERSON,
HENRY J. BOOTH,
HENDERSON & BURR,
BOOTH, KEATING, POMERENE & BOULGER,
*Solicitors and Counsel for Plaintiffs.*

JOSEPH S. CLARK,
HENRY A. McCARTHY,
*Of Counsel.*

63 And afterwards, to-wit: on the 23rd day of September, A. D. 1918, came the Defendants, by their Solicitor, and filed in the Clerk's Office of said Court, their certain Motion to Dismiss, which said Motion is clothed in the words and figures following, to-wit:

*Motion to Dismiss.*

In the United States District Court, Southern District of Ohio, Eastern Division.

In Equity.

No. 106.

I. TICKER BURR, WINTHROP BURR, A. LAWRENCE PIERSON, Thomas B. Gannett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler, and William J. Sturgis, Partners Doing Business under the Firm Name and Style of Parkinson & Burr, Plaintiffs,

vs.

THE CITY OF COLUMBUS, OHIO, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred. P. Zimpfer, Members of the City Council of said City, Defendants.

Motion to Dismiss.

Now come all the defendants in the above entitled action, and move the Court to dismiss this action and that they take their costs in this suit incurred for the following reasons:

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I.

The plaintiffs' bill does not show that any Federal question is made for the consideration of this court.

II.

That there is insufficiency of fact to constitute a valid cause of action in equity against these defendants, or either of them.

III.

The bill does not state any facts which show that the Fourteenth Amendment to the Constitution of the United States has been violated, or that any right of the plaintiff under the amendment has been invaded by the defendants, or either of them.

HENRY L. SCARLETT,
*City Attorney of Columbus, Ohio,*
*Solicitor for Defendants.*

DAVID F. PUGH,
J. A. GODOWN,
*Of Counsel.*

65 And afterwards, to-wit: on the 10th day of October, A. D. 1918, there was filed in the Clerk's Office of said court, a certain affidavit in this cause, which said affidavit is clothed in the words and figures following, to-wit:

*Affidavit of J. D. Mills.*

In the United States District Court, Southern District of Ohio, Eastern Division.

No. 106.

I. TUCKER BURR, WINTHROP BURR, A. LAWRENCE PIERSON, Thomas B. Gannett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler, and William J. Sturgis, Partners Doing Business under the Firm Name and Style of Parkinson & Burr, Plaintiffs,

vs.

THE CITY OF COLUMBUS, OHIO, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred P. Zimpfer, Members of the City Council of said City, Defendants.

Affidavit.

STATE OF OHIO,
*Franklin County, ss:*

J. D. Mills being first duly sworn, deposes and says that the paper writing, consisting of two pages which is hereto attached and made a part hereof, marked "A," is a true and correct copy of a letter written and mailed on or about the 2nd day of October, 1918, to the Honorable Woodrow Wilson, President of the United States by the
66 Honorable George J. Karb, as Mayor of the City of Columbus, Ohio, stating the present emergency existing in the City of Columbus in respect to the street railway situation.

Further affiant saith not.

J. D. MILLS.

Sworn to before me and subscribed in my presence by the said J. D. Mills, this 10 day of October, A. D. 1918.

[SEAL.] SHERMAN B. RANDALL,
*Notary Public in and for Franklin County, Ohio.*

67 October 2nd, 1918.

Hon. Woodrow Wilson, President of the United States, Washington, D. C.

My Very Honored & Esteemed Sir: It is with profound regret that I bring to you for adjustment, an internal affair which has gone, it seems to me, beyond the possibility of internal settlement. I regret exceedingly that conditions are such as appeal to me to call upon you to exercise locally, the great power that has been vested in you by Congress to meet war time necessities.

Some eighteen years ago, the Council of this city passed a street car franchise under the terms of which the company is permitted at this time, to charge 5¢ for cash fares and to sell eight tickets for 25¢ with universal transfer upon either. This is probably as low a fare as has been enjoyed by any city in the United States.

Since the declaration of war the scarcity and cost of material and labor, the latter having been radically increased in August by the award of the War Labor Board, has so increased the cost of operation the company claims, that the furnishing of transportation at the prescribed rates is at a loss and at a confiscation of its property. In or about last March, the company made application to the City Council for such change in its franchise as would permit it to charge a higher fare. At another date, as a result of inaction on the part of the Council, the company asked that it be permitted to charge a rate of six tickets for 25¢ with universal transfer. Later, and because of like inaction on council's part, the company asked the right to charge a straight 5¢ fare. Various attempts were made by
68 the company to secure this relief until finally, I believe it was in June or July, it asked the privilege of charging a rate of 5¢ straight for the period of six months only. I have, in communication to Council and in interviews in the press, urged action along these lines. The matter has been before Council almost weekly, except during its vacation period in August, and yet there seems to be no possibility of that body arriving at any agreement on the matter. The membership of this body is composed of seven men elected at large.

The City Attorney, representing the city before the U. S. Court, in defense of the franchise accepted by the company eighteen years ago, has won his case against the company on first trial. The company had notified Council that it forfeited its franchise except as to those streets on which it claims perpetual rights. It notified the Council and the Mayor that it stood ready to withdraw its cars from these streets whenever ordered to do so. At the same time it refused to sell any more tickets at the rate of 8 for 25¢, and substituted a cash fare of 5¢ and an extra penny for transfer privilege, but accepting all tickets on usual basis that were in the hands of citizens. It claimed the right to do this under one of the amendments of the United States Constitution, which in substance prohibits states, counties or municipalities from doing those things which would confiscate the property of a citizen. In opposition to the company's

claims the city attorney raised the issue that the grounds given were not sufficient to warrant the giving up of the franchise contract and the court ruled in his favor. The Judge, I understand, indicated at the same time, that Council should provide some method of relief for the company and the city attorney has advised Council to
69 this effect and has urged it. The Public Utilities Commission of this state claims to be without jurisdiction in the matter. The latest act of Council on the matter has been to appoint a committee to secure and report to it, through an expert it will select, as to the company's earnings, &c.

In writing to you I am not interested so much in what the true facts may be as to the company's claims nor as to what kind of a franchise it should have to meet present condition or conditions which may prevail later but present time conditions are so serious; so potent in their possibility to threaten the general peace of the city; so dangerous, in fact, that but the moment, the man and the incident may be necessary to cause that explosion which should not be permitted to occur, and that distress to business which we cannot afford to have during the present serious work of the government. At the present time, and since the company made this change, thousands of people are riding the cars without paying fares. The company has instructed its conductors not to put off any passenger who presents a quarter and demands eight tickets therefor. There may be conductors not equipped to handle irritated passengers and irritated passengers who want to argue their rights with the conductor. With cars crowded with passengers, as they are, the opportunity is there for trouble.

The company claims that the final step taken was made necessary by the action of the War Board in increasing the wages of its men thus adding more than $500,000.00 annually to its running expenses. It has also pointed out the greatly increased cost of all materials used by it in the service. Last winter, due to transportation troubles, the coal supply obtainable by the company was
70 so limited that service had to be greatly reduced and at times completely abandoned. The company had trouble too with its power plants with like results. The result is that much feeling was created against the company. Our city charter provides for referendum. If Council should enact legislation to relieve the company, a referendum would undoubtedly be demanded and campaign would but add to the opportunity for trouble.

As I have said, it seems to me that a situation has been reached when settlement of this question is not within the power of local officials and that preservation of peace, the question of justice as between non-paying and paying passengers, the maintenance of service and conservation of the property of the company, require the matter to be taken under control by the government during the existence of the war.

Your very urgent attention is earnestly solicited.

Very respectfully,

GEO. J. KARB, *Mayor.*

71 And afterwards, to-wit: on the 10th day of Octoberm A. D. 1918, there was filed in the Clerk's Office of said court, a certain Affidavit in this cause, which said Affidavit is clothed in the words and figures following, to-wit:

*Affidavit of E. W. Doty.*

United States District Court, Southern District of Ohio, Eastern Division.

No. 106.

I. TICKER BURR et al., Plaintiffs,

vs.

THE CITY OF COLUMBUS, a Municipal Corporation of the State of Ohio, et al., Defendants.

Affidavit of E. W. Doty in Support of Motion for Temporary Restraining Order.

STATE OF OHIO,
*Franklin County, ss:*

E. W. Doty, being first duly sworn, says that the sheet which is hereto attached marked "Exhibit A" and made a part hereof, contains a list of cities in the United States and in Canada in which street railway fares have been advanced within the last few months and that the statements therein contained are true, subject only to the qualification that in a few instances still further increases may have been made within the last few weeks.

E. W. DOTY.

Sworn to before me by E. W. Doty and by him signed in my presence this 10th day of October, 1918.

[SEAL.] HARRY M. RUNKLE,
*Notary Public, Franklin County, Ohio.*

72 EXHIBIT A.

Street Car Service.

During the past year 244 cities in 37 states and Canada have patriotically met the problem of higher cost of the car-ride by increasing the rate of fare. In 203 of these 244 cities the fare is more then 5 cents. In addition, *these* are 18 cities where workingmen's reduced rate tickets have been abolished.

We give the list of cities who have solved this important problem in the only possible way by increasing the rate of street car fare. It shows among other things that Columbus is the victim of conditions that are widespread and not local.

Cities in Which a 10-Cent Fare is Being Charged.

Tacoma, Washington (on Municipal lines). Manistee, Mich. Spencer, Mass.

Cities in Which an 8-Cent Fare is Being Charged.

Reading, Pa. Scranton, Pa. Wilkes-Barre, Pa.

Cities in Which a 7-Cent Fare is Being Charged With One Cent For Transfer.

Newark, N. J.
Paterson, N. J.
Camden, N. J.
Elizabeth, N. J.
Passaic, N. J.
Bayonne, N. J.
Perth Amboy, N. J.
Orange, N. J.
Plainfield, N. J.
New Brunswick, N. J.
Hackensack, N. J.
Rahway, N. J.

Cities in Which a 7-Cent Fare is Being Charged.

Cambridge, Mass.
Tacoma, Wash.
Boston, Mass.
Somerville, Mass.
Manchester, N. H.
Malden, Mass.
Chelsea, Mass.
Newton, Mass.
Everett, Mass.
Joliet, Ill.
Brookline, Mass.
Waltham, Mass.
Meridian, Miss.
Ocean City, N. J.
Bartlesville, Okla.
Mahanoy City, Pa.
Ogdensburg, N. Y.
Woburn, Mass.
Augusta, Me.
Watertown, Mass.
S. Framingham, Mass.
Arlington, Mass.
Waterville, Me.
Winthrop, Mass.
Middleborough, Mass
Lexington, Mass.
Canton, Mass.
Girardville, Pa.
Mauch Chunk, Pa.
Sharon, Mass.
Brookfield, Mass.
Anderson, S. C.
Salamanca, N. Y.
Durham, N. C.
Wilmington, N. C.
Raleigh, N. C.

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Wilmington, N. C.
Shenandoah, Pa.
Lewiston, Me.
Medford, Mass.
Chambersburg, Pa.
Carlisle, Pa.
Keene, N. H.
Natick, Mass.
Salem, N. C.
Charlotte, N. C.
Meridian, Miss.

Cities Which Have a 6-Cent Central Zone, With an Additional Charge for Rides Outside Thereof.

Fall River, Mass.
Lowell, Mass.
Lynn, Mass.
Lawrence, Mass.
Brockton, Mass.
Malden, Mass.
Salem, Mass.
Haverhill, Mass.
Chelsea, Mass.
Quincy, Mass.
Taunton, Mass.
Gloucester, Mass.
Beverly, Mass.
Peabody, Mass.
Melrose, Mass.
Hyde Park, Mass.
Springfield, Mass.
Montpelier, Vt.
Barre, Vt.
Trenton, N. J.
Keyport, N. J.
Baltimore, Md.
Salt Lake City, Utah.
Berkeley, Calif.
Alameda, Calif.
Oakland, Calif.
Piedmont, Calif.
Emeryville, Calif.
San Leandro, Calif.
Edmonton, Can.
Montreal, Can.

Cities in Which a 6-cent Fare is Being Charged.

St. Louis, Mo.
Kansas City, Mo.
Portland, Ore.
Vancouver, Canada.
New Haven, Conn.
Bridgeport, Conn.
New Bedford, Mass.
Hartford, Conn.
Reading, Pa.
Kansas City, Kan.
Wilmington, Del.
Waterbury, Conn.
Erie, Pa.
Atlantic City, N. J.
Saginaw, Mich.
New Britain, Conn.
McKeesport, Pa.
Chester, Pa.
Lexington, Ky.
Jackson, Miss.
Aurora, Ill.
Stamford, Conn.
Easton, Pa.
Poughkeepsie, N. Y.
Mt. Carmel, Pa.
Battle Creek, Mich.
Meriden, Conn.
Elgin, Ill.
Nashua, N. H.
Norwalk, Conn.
Hagerstown, Md.
Paducah, Ky.
Middletown, Conn.
Danbury, Conn.
White Plains, N. Y.
Pottsville, Pa.
Duquesne, Pa.
Northampton, Mass.
Oil City, Pa.
Peekskill, N. Y.
Torrington, Conn.
Sioux Falls, S. D.
Woburn, Mass.
Ithaca, N. Y.
Cairo, Ill.
Fairmont, W. Va.
Jacksonville, Ill.
Connellsville, Pa.
Chickasha, Okla.
Newburyport, Mass.
Ansonia, Conn.
Rutland, Vt.
Hornell, N. Y.
Milford, Mass.
Naugatuck, Conn.
Albuquerque, N. M.
Meadville, Pa.
Plymouth, Mass.
Geneva, N. Y.
Ossining, N. Y.
Dover, N. H.
Wakefield, Mass.
Greenfield, Mass.
Laurel, Miss.
Beacon, N. Y.
Latrobe, Pa.
Frederick, Md.
Danvers, Mass.
Rochester, N. H.
Derby, Conn.
Athol, Mass.
Braintree, Mass.
Claremont, N. H.
Maynard, Mass.
Stoughton, Mass.
Branford, Conn.
Amherst, Mass.
Bellows Falls, Vt.
Waverly, N. Y.
Randolph, Mass.
Houston, Tex.
Kankakee, Ill.
Galveston, Tex.
Racine, Wis.
Oakland, Calif.
Harrisburg, Pa.
Denver, Colo.
Fresno, Calif.
Albany, N. Y.
Wildwood, N. J.
Macon, Ga.

74 Cities Which Have a Central 5-cent Zone, With an Additional Charge for Rides Outside Thereof.

Pittsburgh, Pa.
Milwaukee, Wis.
Providence, R. I.
Springfield, Mass.
Holyoke, Mass.
Pawtucket, R. I.
Woonsocket, R. I.
Norwich, Conn.
Chicopee, Mass.
New London, Conn.
Westfield, Mass.

Cities Having a 5-cent Fare, With an Additional Charge of 1 Cent for a Transfer.

Cleveland, Ohio.
Jersey City, N. J.
Toledo, Ohio.
Hoboken, N. J.

Cities in Which Reduced Rate Tickets Have Been Abolished and a Straight 5-cent Fare is Charged.

Seattle, Wash.
Des Moines, Ia.
Duluth, Minn.
St. Joseph, Mo.
Evansville, Ind.
Altoona, Pa.
Roanoke, Va.
Decatur, Ill.
Joliet, Ill.
Quincy, Ill.
Everett, Wash.
Columbia, S. C.
Lynchburg, Va.
Danville, Ill.
Sheboygan, Wis.
Bloomington, Ill.
Muncie, Ind.
Galesburg, Ill.
Anderson, Ind.
New Albany, Ind.
Shamokin, Pa.
Fon du Lac, Wis.
Asheville, N. C.
Marion, Ind.
Greensboro, N. C.
Kingston, Canada.
Owensboro, Ky.
Vincennes, Ind.
Muscatine, Ia.
Hot Springs, Ark.
Port William, Canada.
Bluefield, W. Va.
Champaign, Ill.
Bridgeton, N. J.
Cortland, N. Y.
High Point, N. C.
Elwood, Ind.
Jeffersonville, Ind.
Urbana, Ill.
Waynesboro, Pa.
Tyrone, Pa.

Cities in Which Workmen's Reduced Rate Tickets Have Been Abolished.

Toledo, Ohio.
Shamokin, Pa.
Biddeford, Me.
Gary, Ind.
Greensboro, N. C.
Greenfield, Mass.
Bluefield, W. Va.
High Point, N. C.
Sanford, Me.
Concord, N. C.
Claremont, N. H.
Salisbury, N. C.
Valparaiso, Ind.
Stoughton, Mass.
Randolph, Mass.
Spencer, N. C.
Hadley, Mass.
Graham, Va.

THE COLUMBUS RAILWAY, POWER & LIGHT COMPANY.

75 And afterwards, to-wit: on the 10th day of October, A. D. 1918, there was filed in the Clerk's Office of said Court, a certain Certified Copy of Articles of Incorporation of The Columbus Railway Company, which said Certified Copy is clothed in the words and figures following, to-wit:

*Certified Copy of Articles of Incorporation of The Columbus Railway Company.*

Corporation for Profit. Form AA. (Preferred Stock.)

These Articles of Incorporation of The Columbus Railway Company

Witnesseth, That we, the undersigned, *all of whom are citizens of the State of Ohio, desiring to form a corporation, for profit, under the general corporation laws of said State, do hereby certify:

First. The name of said corporation shall be The *The* Columbus Railway Company.

*"All" or "a majority."

Second. Said corporation is to be located at Columbus in Franklin County, Ohio, and its principal business there transacted.

Third. Said corporation is formed for the purpose of acquiring, by purchase or lease, constructing, extending, owning, operating and maintaining street railroads, to be operated by electricity, or other motive power on, over and through the streets and alleys of the City of Columbus, Franklin County, Ohio, and the suburbs thereof, and to, in and through the villages and hamlets in said County.

Fourth. The Capital stock of said corporation, common and preferred, shall be Seven Million Dollars ($7,000,000) consisting of thirty five thousand (35,000) shares of common stock of the par value of One Hundred Dollars ($100.00) each, and thirty-five thou-
sand (35,000) shares of preferred stock of the par value of
76 One Hundred Dollars ($100.00) each; the purchasers and owners of the preferred stock shall be entitled to a dividend of five per cent. per annum out of the surplus profits for each year in preference to all other stockholders.

In Witness Whereof, We have hereunto set our hands, this eighteenth day of August, A. D. 1899.

P. W. HUNTINGTON.
DAVID S. GRAY.
NATHAN B. ABBOTT.
WILLIAM F. BURDELL.
HOWARD C. PARK.

77 THE STATE OF OHIO,
*County of Franklin, ss:*

Personally appeared before me, the undersigned, a Notary Public in and for said county, this 18th day of August A. D. 1899 the above-named P. W. Huntington, David S. Gray, Nathan B. Abbott, William F. Burdell and Howard C. Park, who each severally acknowledged the signing of the foregoing articles of incorporation to be his free act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal on the day and year last aforesaid.

[NOTARIAL SEAL.] CHARLES F. PRYOR,
*Notary Public in and for*
*Franklin County, Ohio.*

(10¢ I. R. Stamp, Canc.)

THE STATE OF OHIO,
*County of Franklin, ss:*

I, Chas. F. Galloway, Clerk of the Court of Common Pleas, within and for the county aforesaid, do hereby certify that Charles F. Pryor whose name is subscribed to the foregoing acknowledgment as a Notary Public was, at the date thereof, a Notary Public, in and

for said county, duly commissioned and qualified, and authorized as such to take said acknowledgment; and further, that I am well acquainted with his handwriting, and believe that the signature to his acknowledgment is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Columbus, this 18" day of August, A. D. 1899.

(10¢ I. R. Stamp, Canc.)

[CLERK'S SEAL.]

CHAS. F. GALLOWAY, *Clerk,*
By JOS. W. WICKHAM, *Deputy.*

78 (*Certificate under Section* 906, *Revised Statutes of the United States.*)

UNITED STATES OF AMERICA,
*State of Ohio:*

Office of the Secretary of State.

I, William D. Fulton, Secretary of State of the State of Ohio, and being the officer who, under the Constitution and Laws of said State, is duly constituted the keeper of the records of articles of incorporations of all companies incorporated under the laws thereof, and the records of all papers relating to the creation of said incorporated companies, and empowered to authenticate exemplifications of the same, do hereby certify that the annexed instrument is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Articles of Incorporation of The Columbus Railway Company filed in this office on the 19th day of August, A. D. 1899, and recorded in Volume 78, Page 179, of the Records of Incorporations; that said exemplification is in due form and made by me as the proper officer, and is entitled to have full faith and credit given it in every court and office within the United States.

In testimony whereof, I have hereunto attached my official signature and the Great Seal of the State of Ohio, at Columbus, this 9th day of October, A. D. 1918.

[SEAL.]

WM. D. FULTON,
*Secretary of State.*

79 And afterwards, to-wit: — there was filed in the Clerk's Office of said Court a certain Certified Copy of Articles of Incorporation of The Central Market Street Railway Company, which said Certified Copy is clothed in the words and figures following, to-wit:

*Certified Copy of Articles of Incorporation of The Central Market Railway Company.*

These Articles of Incorporation of The Central Market Street Railway Company

Witnesseth, That we, the undersigned, *all of whom are citizens of the State of Ohio, desiring to form a corporation, for profit, under the general corporation laws of said State, do hereby certify:

First. The name of said corporation shall be The Central Market Street Railway Company.

Second. Said corporation is to be located at Columbus in Franklin County, Ohio, and its principal business there transacted.

Third. Said corporation is formed for the purpose of constructing, maintaining, operating and owning a line of street railway for the carrying of passengers, baggage, express and freight, to be run by electricity or some motive power other than steam or horse, with single or double tracks, side tracks, turnouts, spurs, switches, turntables, offices, stations, depots, power houses, barns, machine and repair shops, ware houses, telephone and telegraph lines necessary for its use; of leasing and using the tracks and facilities of other railway companies; of leasing and sub-letting the use of its tracks and facilities to other railway companies; of acquiring and holding real estate and other accessories and appliances such as may be necessary and proper to carry out the purposes and privileges herein men-
80 tioned. The said line of railway will be located in and upon the streets, alleys, public ways and private grounds of the city of Columbus, Franklin County, Ohio, and having the City of Columbus as one of its termini, thence through the counties of Franklin and Fairfield to the city of Lancaster, Ohio and through the counties of Franklin, Pickaway, Ross, Pike and Scioto to the city of Portsmouth, Ohio, with the right and purpose to construct, maintain and operate such branches or spur tracks from said main line as may be hereafter determined upon and authorized, and to do all other things necessary and proper to carry out the purposes and exercise the privileges hereinbefore specified.

Fourth. The capital stock of said corporation shall be Ten Thousand Dollars ($10,000.00) divided into One Hundred (100) shares of One Hundred Dollars ($100.00) each.

In witness whereof, we have hereunto set our hands this fifth day of January, A. D. 1901.

S. B. HARTMAN.
O. A. SCHENCK.
LOUIS SEIDENSTICKER.
WM. H. LUCHTENBERG.
BENJAMIN MONETT.

*"All" or "a majority."

81 THE STATE OF OHIO,
*County of Franklin, ss:*

Personally appeared before me, the undersigned, a Notary Public in and for said county, this fifth day of January, A. D. 1901, the above named S. B. Hartman, O. A. Schenck, Louis Seidensticker, Wm. H. Luchtenberg and Benjamin Monett who each severally acknowledged the signing of the foregoing articles of incorporation to be his free act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal on the day and year last aforesaid.

[NOTARIAL SEAL.] W. V. BAKER,
*Notary Public.*

(10¢ I. R. Stamp, Canc.)

THE STATE OF OHIO,
*County of Franklin, ss:*

I, John W. McCafferty, Clerk of the Court of Common Pleas within and for the county aforesaid, do hereby certify that W. V. Baker whose name is subscribed to the foregoing acknowledgment as a Notary Public was at the date thereof a Notary Public in and for said county, duly commissioned and qualified, and authorized as such to take said acknowledgment; and further that I am well acquainted with his handwriting, and believe that the signature to said acknowledgment is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Columbus, Ohio, this 5″ day of January, A. D. 1901.

[CLERK'S SEAL.] JOHN W. McCAFFERTY, *Clerk.*

(10¢ I. R. Stamp, Canc.)

82 (*Certificate under Section* 906, *Revised Statutes of the United States.*)

UNITED STATES OF AMERICA,
*State of Ohio:*

Office of the Secretary of State.

I, William D. Fulton, Secretary of State of the State of Ohio, and being the officer who, under the Constitution and Laws of said State, is duly constituted the keeper of the records of articles of incorporations of all companies incorporated under the laws thereof, and the records of all papers relating to the creation of said incorporated companies, and empowered to authenticate exemplifications of the same, do hereby certify that the annexed instrument is an ex-

emplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Articles of Incorporation of The Central Market Street Railway Company, filed in this office on the 5th day of January, A. D. 1901, and recorded in Volume 83, Page 537, of the Records of Incorporations; that said exemplification is in due form and made by me as the proper officer, and is entitled to have full faith and credit given it in every court and office within the United States.

In testimony whereof, I have hereunto attached my official signature and the Great Seal of the State of Ohio, at Columbus, this 9th day of October, A. D. 1918.

[SEAL.] WM. D. FULTON,
*Secretary of State.*

83 And afterwards, to-wit: on the 10th day of October, A. D. 1918, there was filed in the Clerk's Office of said Court certain Copies of Acceptances of Ordinances, which said Certified Copies are clothed in the words and figures following, to-wit:

*Certified Copies of Acceptances of Ordinances.*

To the City Council of the City of Columbus, Ohio:

We have the honor to inform your Honorable Body that at a meeting of the Board of Directors of The Columbus Railway Company, held this 29th day of April 1901, a resolution of which the following is a copy, was duly adopted by said Board:

"Resolved, that this, The Columbus Railway Company, accept and it does hereby accept each and all of the terms, provisions and requirements of the ordinance passed by the City Council of the City of Columbus, on February 4th, 1901, entitled 'An Ordinance No. 17,801, renewing to The Columbus Railway Company, for a term of twenty-five (25) years, its grants, rights, privileges and franchises, to maintain and operate its tracks and lines of street railroad upon the streets and avenues, and parts of streets and avenues, hereinafter mentioned, in the City of Columbus, Ohio, and prescribing the terms and conditions thereof and repealing the provisions of any and all ordinances and resolutions, and parts of ordinances and resolutions, inconsistent with the terms of this ordinance:' and that the President and Secretary of this Company be and they are hereby directed to file with the Clerk of said City a copy of this resolution as evidence of the acceptance in writing by this Company of each and all of the terms, provisions and requirements of said ordinance and to
84 certify that this Company accepts each and all of the terms, provisions and requirements of said ordinance."

We further certify that the said The Columbus Railway Company accepts in writing each and all of the terms, provisions and requirements of said ordinance.

In Witness Whereof, the President and Secretary have hereunto set their hands and affixed the corporate seal of said Company this 29th day of April, 1901.

[SEAL.] THE COLUMBUS RAILWAY COMPANY,
By ROBERT E. SHELDON, *President,*
By P. V. BURINGTON, *Secretary.*

I Hereby Certify That the foregoing is a true and correct copy of the acceptance by The Columbus Railway Company of the terms and conditions of An Ordinance No. 17,801 passed by the City Council of the City of Columbus, Ohio, February 4, 1901, as filed with the City Clerk of said City April 29, 1901, as shown by the records now on file in this office.

[SEAL.] JAS. J. THOMAS,
*City Clerk of the City of Columbus, Ohio.*

Office of the City Clerk, Columbus, Ohio, Oct. 10, 1918.

85 Columbus, Ohio, January 22, 1901.

To the Board of Public Works and City Council of the City of Columbus, Ohio:

The Central Market Street Railway Company hereby accepts the terms and conditions of the Ordinance passed by said Council on January 21st, 1901, entitled "An Ordinance No. 17802 Granting permission to The Central Market Street Railway Company, its successors and assigns, to construct, operate and maintain, a single or double track street railway with necessary sidetracks, curves, turnouts and switches, in the following streets in the City of Columbus, Ohio, to-wit: Rich street, Fifth street, Donaldson street, Livingston avenue, Mohawk street, Reinhard avenue, Jaeger street, Hanford street, Fourth street, Hosack street, Innis avenue, and Parsons avenue to the south corporation line of said City;" and transmits herewith a copy of the resolution adopted by the directors of said Company, authorizing this acceptance.

THE CENTRAL MARKET STREET RAILWAY,
By S. B. HARTMAN, *President.*

Whereas, the City Council of the City of Columbus, Ohio, on January 21st, 1901, passed an ordinance entitled "An Ordinance No. 17,802, Granting permission to The Central Market Street Railway Company, its successors and assigns to construct, operate, and maintain a single or double track street railway, with necessary side tracks, curves, turnouts and switches in the following streets in the City of Columbus, Ohio, to-wit: Rich street, Fifth street, Donaldson street, Livingston avenue, Mohawk street, Reinhard avenue, Jaeger street, Hanford street, Fourth street, Hosack street, Innis avenue and Parsons avenue to the south corporation line of said City," and

86 Whereas, said ordinance provides among other things as follows: "Sec. 25. This ordinance shall take effect and be in

force from and after its passage and legal publication and the filing with the City Clerk of said City, by said Company, of a written acceptance of its terms and conditions, and the payment of said Company of the cost of publication of this ordinance," and

Whereas, it is desirable that this Company enter into such proposed contract with said City by accepting the terms and conditions of said ordinance; therefore,

Be It Resolved by the Board of Directors of The Central Market Street Railway Company that this Board for and on behalf of said Company hereby accepts the terms and conditions of said ordinance No. 17802, and that as an evidence of the acceptance by said Company of the terms and conditions of said ordinance, a copy of this resolution and preamble be transmitted to and filed with the clerk of the City of Columbus, Ohio, and the President of this Company is hereby authorized and empowered in the name of and on behalf of this Company to sign a written acceptance of said ordinance.

Columbus, Ohio, Jan. 22, 1901.

I hereby certify that the foregoing is a full and correct copy of the preamble and resolution adopted by the Board of Directors of The Central Market Street Railway Company at a meeting of said Board held January 22, 1901.

O. A. SCHENCK, *Sec'y.*

Filed with City Clerk of the City of Columbus, Ohio, at 3:50 o'clock P. M., Jan. 22, 1901.

JOHN T. BARR,
*City Clerk.*

87 Presented to the City Council of the City of Columbus, Ohio, and ordered placed on file Jan. 28, 1901.

JOHN T. BARR,
*City Clerk.*

I Hereby Certify That the foregoing is a true and correct copy of the acceptance by The Central Market Street Railway Company of the terms and conditions of An Ordinance No. 17,802 passed by the City Council of the City of Columbus, Ohio, January 21, 1901, as filed with the City Clerk of said City January 22, 1901, as shown by the records now on file in this Office.

[SEAL.] ELINATHAN PETTIT,
*Assistant City Clerk of the City of Columbus, Ohio.*

Office of the City Clerk, Columbus, Ohio, Oct. 9, 1918.

And afterwards, to-wit: on the 10th day of October, A. D. 1918, an Entry was made on the Journal of said Court in this cause which said Entry is clothed in the words and figures following, to-wit:

*Entry* (2-337).

No. 106.

I. TUCKER BURR et al., Complainants,

vs.

THE CITY OF COLUMBUS et al., Defendants.

Entry.

This day this cause came on to be heard upon the motion for temporary restraining order and for preliminary injunction heretofore filed by the complainant herein, and on motion to dismiss filed by the defendants, which motions were argued by counsel for the respective parties and said matters taken under advisement by the court.

88 And afterwards, to-wit: on the 29th day of October, A. D. 1918, the Opinion of Judge Hollister was filed in the Clerk's Office of said Court in this cause, which said Opinion is clothed in the words and figures following, to-wit:

*Opinion of Judge Hollister.*

In the District Court of the United States, Southern District of Ohio, Eastern Division.

No. 106.

I. TUCKER BURR et al., Complainants,

v.

THE CITY OF COLUMBUS, OHIO, et al., Defendants.

Opinion.

Heard on motion of complainants for a preliminary injunction restraining the defendants, pending the suit, from in any way forcing or compelling, or attempting to force or compel, The Columbus Railway, Power & Light Company, a corporation of Ohio, hereinafter called the company, to operate its lines of street railway in the city of Columbus under the certain ordinances set out in the bill; and on defendants' motion to dismiss the bill.

The complainants are owners of mortgage bonds of the series of first mortgage bonds executed by the company.

It is assumed for the purposes of this case that complainants have the capacity to bring the suit, and, being citizens of different states

than Ohio, the court has jurisdiction to entertain it and make appropriate orders.

89 With the exception of parties plaintiff, this bill is in substance, and almost exactly in language, the same as the bill filed by the company in the suit instituted by it, in which Judge Westenhaver found, in an exhaustive opinion handed down September 20, 1918, that the court had no jurisdiction, in that no federal jurisdiction was involved, and that the bill, on the facts alleged, was without merit.

The changes in the bill are designed to make a stronger case than the allegations in the bill in the suit brought by the company presented. To the statement in that bill "the further operation of said company's street railway property at said rates of fare would be not only impracticable but impossible, both financially and otherwise" is added, "and would bankrupt said company within a short time." This bill includes also allegations, not found in that bill, showing that the franchise rate of fare is unfair, unreasonable and confiscatory, and the injury that would result to complainant's security in the event of bankruptcy. From the prayer is omitted the prayer in the company's bill that the city be enjoined from interfering with the possession or control of the street railway property. Other minor changes need not be noticed.

With the exception of the question of complainants' capacity to sue, Judge Westenhaver's opinion in the company's case is applicable to every issue presented in this case. Since I agree with his conclusions, it would be a useless task to again discuss all of the principles involved, or to set out at length the numerous authorities dealing with them. I have considered all of them, and the elaborate

90 briefs of counsel, worthy of so important a case, which, as one of counsel for complainants remarked at the opening of the argument, presents some novel considerations.

Some observations appropriate to these may not, however, be amiss.

The novel feature of prime importance lies in the claim of complainants that the doctrine of implied conditions in the law of contracts is applicable to the facts stated in the bill. The diligence of counsel has not discovered a case like it. The able opinion of Judge Killits in the Toledo Street Railway Case (August 2, 1918), of Judge Tuttle in the Detroit Street Railway Case (August 12, 1918), of Judge Chatfield in the Brooklyn case (September 9, 1918), and of Judge Allread in the Village of Fort Loramie case (July 9, 1918), are not applicable, for the reason that in all these the street railway franchises had expired. Here, the primary question in the case is, whether or not they have come to an end. If they have, then the consideration of these cases would be necessary, as well as the highly important case of the Denver Water Works, decided by the Supreme Court of the United States March 4, 1918, 246 U. S. 178. If the conclusion is right, that, under the authorities, the offer and acceptance of the franchises in question constitute a contract binding on both parties for the twenty-five years of their respective lives, then these cases have no application, unless the circumstances alleged are such as to bring into operation rules which excuse the performance of

a contract solemnly entered into. If such circumstances exist, it might be said, as it is in this case, that the franchises having come to an end by the nonfulfillment of conditions implied when the
91 contracts were made, an attempt to enforce the contracts and require the carrying of passengers at the agreed upon rate is the same as if the council had passed an ordinance prescribing confiscatory rates.

Whether or not there may be a difference between agreed rates and prescribed rates accepted by the grantee in such franchises as these, and whatever views may be entertained by courts of last resort in some of the states on the propriety of the grantee's bringing a contract, binding on the grantor, to an end because the agreement only requires operation at prescribed rates while the franchises are being enjoyed, is not, in Ohio, important; for, under the decisions to which Judge Westenhaver called attention, and especially the decision of the Supreme Court of the United States in the Cleveland Street Railway Case, 194 U. S. 517, in which Chief Justice White said (536), "we can see no escape from the conclusion, that the ordinances were intended to be agreements binding upon both parties definitely fixing the rates of fare which might be thereafter charged," the question is no longer, in a district court, open to debate.

At the conclusion of the arguments of counsel, the legal questions being presented at length and with much clearness, I had no doubt that the franchises were contracts for their full terms, but had some doubt of the correctness of the defendants' contention that the doctrine of implied conditions was not applicable to the facts of this case, both as to complainants' claim that the pending world-war and the consequential increased wage of labor to an ex-
92 tent that would bankrupt the company unless it received higher rates than the contract rates, and as to the action of the War Labor Board in fixing wages in an amount so large as to bring about the same result, could not have been in contemplation of either party at the time the contracts were entered into, and that therefore the contracts were at an end.

That doubt lingers still. It must be conceded by defendants that when the contracts were made, the parties could not have had in mind the possibility that years thereafter such a catastrophe as this war would have befallen the world, and that the extraordinary rise in the cost of living, resulting therefrom, would have required an advance in the cost of labor so great as, if operation under the franchises were continued at the contract rate, to bankrupt the company; or that what was in effect a governmental compulsory war board of arbitration would fix a confiscatory wage for labor.

If, to the facts involved in this concession, is applied what was said by Mr. Justice Matthews in Railway v. Hoyt, 149 U. S. 1, 15, and by Vaughan Williams, L. J., in Krell v. Henry, 2 L. R. K. B. (1903) 740, it will be appreciated that much may be said in support of complainants' position. In the former case it was said (15):

"But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contract-

ing parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

93 And in the latter (749):

"I do not think that the principle of the civil law as introduced into the English law is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing which is the subject-matter of the contract or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things."

It is urged that when the contracts were made the city wished to get their benefits for twenty-five years, and the company expected to obtain the advantage of operation for twenty-five years. Thus the contracts were to be of mutual advantage for that length of time. It is argued that both parties knew, agreeing on the terms accordingly, that bankruptcy would make impossible the fulfillment of the contracts, and that its consequence would be disastrous to both parties; that they knew that wages were the greatest single item in the cost of operation; that they had in mind only such increases or decreases as might be expected in normal times; that if the rate of fare per passenger was low, such increases of labor as normal conditions might bring about would be compensated by the increased number of fares in a growing city such as was Columbus at the time the contract was entered into, and is now; and that the wages of labor in normal times was a condition implied from a consideration of the parties, the entire contract, its peculiar character, and from
94 all circumstances.

This argument carries counsel further than the circumstances of this case require, and if sound, would lead to the conclusion that any abnormal labor conditions of such a character as to bring about the bankruptcy of the contractor by rendering compliance impossible would excuse him from performance and bring his contract to an end. This cannot be. A frequent illustration of abnormality in labor conditions is strikes, and their often disasterous financial consequences to the employer of labor. No one would now say that strikes and their results, however serious the financial consequences, bring to an end the contractor's obligation to perform his contract requiring the employment of labor. For still less cause could one affirm that if, upon adjustment of the controversy, the contractor agrees on a wage so high that it would bankrupt him within a short time, he could terminate his contract.

The case finds no analogy in those cases in which it is held that a

contract for personal service comes to an end on the death of him who has contracted to perform it; or in those cases in which a fact must have been in the minds of the parties without which the express contract, silent on the subject, would not have been entered into, such as C. & O. R. Co. v. McKell, 209 Fed. Rep. 514, 522, (C. C. A. 6); Wheeling & L. E. R. Co. v. Carpenter, 218 Fed. Rep. 273, 285 (C. C. A. 6), in which express contracts by a railroad compaany with the proprietor of a coal mine on its road to take for itself for fuel purposes, or to haul away, a stipulated amount of coal, were held to embody implied agreements that the railroad company would supply sufficient cars to haul the stipulated amount of coal away; or in such cases as Krell v. Henry, in which the conclusion was, that, inasmuch as the letting of the windows was, as well understood by both parties, to permit the user to see King Edward's coronation procession, the indefinite postponement of that ceremony, because of the illness of the King, brought the contract to an end; or in the Seamen's Case, Liston, v. Steamship Carpathian, 2 L. R. K. B. (1915) 42, in which it was held that the seamen's contract for the entire voyage was, at their election, brought to an end before completion by the danger of capture by enemy ships, the threat of which was learned by the seamen at a port at which the ship touched during progress of the voyage, and from which the sailors refused to proceed except at an increased wage.

If there is any analogy presented by the Seamen's Case, it lies in the fact that in that case the danger of capture during the voyage was not in the minds of the ship-owner or the seamen when the shipping articles were agreed to; while in this case the certainty of bankruptcy growing out of conditions affecting wages brought about by the same war, could not have been contemplated by either party. Logically, if the Seamen's Case is applicable to this, and should be adopted as the law of such a case as this (it was decided in February, 1915) the way would be open for the destruction of innumerable contracts to carry out which the employment of labor is necessary and which the parties expected, and agreed, to carry out, whatever the condition of the labor market might be during performance. In my judgment, the Seamen's Case does not apply to this (it is regrettable that the opinion of the court does not discuss the question involved in it from the standpoint of principle or previous decisions); nor do I think what was said by Mr. Justice Matthews and Vaughan Williams, L. J., hereinbefore quoted, do apply or were intended to apply to any possible case which might arise. In those cases the parties did not have in mind, and there was no reason why they should, that in one, the particular circumstances over which they had no control might prevent the storing of the grain the railroad company agreed to deliver and was ready and willing to deliver; and, in the other, that the procession, to see which was the object of the contract, might not take place.

But the circumstances here present a different case. In the preparation for the bidding there were a number of prime factors the company had in mind in determining the rate at which it was willing to carry such passenger. That was based on a number of

considerations: The then population of Columbus; the rate of increase in the city's population, as shown by the census, and perhaps by interim statistics; and the cost of operation, including salaries, supplies, and especially wages. The great item of cost each year would be wages, seldom subject to diminution, and having in it even at that time potentialities of tremendous increase. What labor in this country would be demanding during twenty-five years was one of the most important questions to be debated by the promoters of complainants' predecessors.

97 On the figure to be paid in wages each year depended the great question of dividends, without at least the hope of which the franchises would not have been sought. Unexpected conditions in the labor market growing out of a war of such character as to have been beyond the anticipation of anyone, have thrown the carefully considered plan, which involved revenues greater than cost, out of adjustment; have reversed the contemplated ratio of revenue to cost, and have defeated the plan.

While the parties did not anticipate the happening of this war, yet the contractor might well have anticipated such rising wages, possible during twenty-five years from whatsoever cause, as might wreck the plan and precipitate bankruptcy. As in the law he would be required to guard himself against the consequences of non-fulfillment by reason of strikes, so here the contractor could have guarded itself against an increase in the cost of labor so great as to prevent his doing what he agreed to do. Contracts for future performance often contain a clause excusing the contractor from performance made impossible by future happenings over which he has no control.

Of course, the grantee here intended, expected and contracted to operate under the franchises for twenty-five years at the contract rate. Since to do this it was necessary that wages should be always at a figure which made performance possible, it was necessary, in my judgment, for the grantee of these franchises to have guarded against a situation which might happen, namely, the failure of reve-

98 nue to meet expenses through circumstances unanticipated and over which the grantee had no control.

This brings into application what was also said by Mr. Justice Matthews in Railway v. Hoyt, 149 U. S. 1, 14, 15;

"There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently became impossible, or pay damages for the non-performance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor."

If this conclusion is sound, and I think it presents the better argument in the debate, then the doubt must be, and it is, so far as this court is concerned, resolved in favor of the defendants.

But, it is said, these wages were fixed at a confiscatory rate by the War Labor Board, and thereby the case is brought within the principle of Metropolitan Water Board v. Dick, Appeal Cases, 119, H. of L. (1917), 2 K. B. 1, and of Judge Ray's decision in the Knitting

Company Case, 250 Fed. Rep. 278, in which a contractor was excused from performance. In one, the English government commandeered the plant of a contractor to build water works, making it impossible for him to proceed with his contract. In the other, the Knitting Company's mill was, in effect, commandeered by the United States government, rendering the performance of its contracts with others impossible.

This is a different case. Here the government did not
99 interfere directly with the contract, or appropriate in any way the complainants' plant to any of the government's purposes. The vis major apparent in those causes is wholly lacking here. It is true that the requirement to submit to the arbitration of the War Labor Board was, in effect, compulsory, and its award binding, but it was not the award which brought about the condition which threatens the company with bankruptcy; it was the condition which made the award necessary which brought the result. Presumably the award was just. Any proper adjustment between the company and its employees would necessarily have been substantially, so far as results are concerned, the same sum as the award.

From what has been said, the conclusion must be that these franchises constitute valid contracts for twenty-five years from their date, binding on both parties; that the doctrine of implied conditions is not applicable to the circumstances of the case; that no federal question is involved, and that the bill is without merit.

It is urged that since the court has acquired jurisdiction through the diverse citizenship of the parties that a preliminary restraining order may issue, in view of the great existing public emergency growing out of the controversy between the city and the company. Whatever might be the power of the court in an action by the city against the company for specific performance to hold the situation in statu quo until the legal rights of the parties are determined, it is not called into exercise here, for reasons dealt with by Judge Westenhaver and for the reason that the court has no power to issue a preliminary restraining order in a case in which the court, on hearing the motion to dismiss, is of opinion that the complainant
100 has no cause of action.

The bill will be dismissed at complainants' costs. Necessarily, the motion for a preliminary injunction is denied.

We have been discussing legal rights cognizable by a court of equity. The allegations in the bill, however, present other aspects and involve considerations of the highest moment to the people of Columbus, to the public comfort, convenience and peace, as well as to the large interests of complainants now jeopardized by the situation unforseen by it and the city when the franchises were granted, and which, unhappily, the company's predecessors did not safeguard, although they should have done so. "The present emergency," Judge Westenhaver said in the company's case, "calls urgently for some kind of accommodation or temporary compromise between the parties." In that, and all that he says in that behalf, I agree, and may be permitted to express the hope that the city's representatives will meet with the representatives of the company in a spirit of ac-

commodation and compromise, and that the representatives of the company will meet with them and frankly disclose such facts as the city's representatives should know when the question of what would be a reasonable rate, under the present conditions, is discussed and agreed upon.

HOLLISTER,
*District Judge.*

October 28, 1918.

101 William O. Henderson, Henry J. Booth, Henderson & Burr, Booth, Keating, Pomerene & Boulger, Solicitors and Counsel for Complainants.

Joseph S. Clark, Henry A. McCarthy, of Counsel.

Henry L. Scarlett, City Attorney, and Pugh & Pugh, of Counsel for Defendants.

102 And afterwards, to-wit: on the 9th day of November, A. D. 1918, an Entry was made on the Journal of said Court in this cause, which said Entry is clothed in the words and figures following, to-wit:

*Entry* (2-343).

No. 106.

I. TUCKER BURR, WINTHROP BURR, A. LAWRENCE PIERSON, Thomas B. Gammett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler, and William J. Sturgis, Partners Doing Business under the Firm Name and Style of Parkinson & Burr, Plaintiffs,

vs.

THE CITY OF COLUMBUS, OHIO, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred F. Zimpfer, Members of the City Council of said City, Defendants.

Entry.

This cause coming on to be heard at this term on the plaintiffs' motion for a temporary restraining order and a preliminary injunction based on their verified bill and the affidavits and papers in support thereof, and on defendan's' motion to dismiss said bill for the reasons therein stated, and having been argued by counsel, it is now, upon consideration thereof, ordered, adjudged and decreed by the Court as follows: That the plaintiffs' said motion be and is
103 hereby overruled and denied; that said motion of the defendan's to dismiss this suit be and is hereby sustained; that this cause be and is hereby dismissed because the bill does not state facts

constituting a valid cause of action in equity against the defendants or any of them; that on the facts s ated in said bill the Court has no jurisdiction of the cause; and that the defendants recover their costs herein of the plaintiffs; to which order, judgment and decree of the Court, and every part thereof, the plaintiffs except.

HOLLISTER, *Judge.*

104 And afterwards, to-wit: on the 9th day of November, A. D. 1918, a Petition for Appeal was filed in the Clerk's Office of said Court in this cause, which said Petition for Appeal is clothed in the words and figures following, to-wit:

*Petition for Appeal.*

In the United States District Court, Southern District of Ohio, Eastern Division.

No. 106.

I. Tucker Burr, Winthrop Burr, A. Lawrence Pierson, Thomas B. Gammett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler, and William J. Sturgis, Partners Doing Business under the Firm Name and Style of Parkinson & Burr, Plaintiffs,

vs.

The City of Columbus, Ohio, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred F. Zimpfer, Members of the City Council of said City, Defendants.

Petition for Appeal.

The above named plaintiffs conceiving themselves aggrived by the order, judgment and decree entered on the 9th day of November, 1918, in the above entitled cause, hereby appeal from said order, judgment and decree to the Supreme Court of the United
105 States, and they pray that this their appeal may be allowed; and that a transcript of the record and proceedings and papers, including the opinion of the Court, upon which said order, judgment and decree *was* made, duly authenticated, may be sent to the Supreme Court of the United States.

WILLIAM O. HENDERSON,
HENRY J. BOOTH,
HENDERSON & BURR, and
BOOTH, KEATING, POMERENE & BOULGER,
*Solicitors for said Plaintiffs and Appellants.*

JOSEPH S. CLARK,
HENRY A. McCARTHY,
*Of Counsel.*

And afterwards, to-wit: on the 9th day of November, A. D. 1918, an Assignment of Errors was filed in the Clerk's Office of said Court in this cause, which said Assignment of Errors is clothed in the words and figures following, to-wit:

106 *Assignment of Errors.*

In the United States District Court, Southern District of Ohio, Eastern Division.

No. 106.

I. TUCKER BURR, WINTHROP BURR, A. LAWRENCE PIERSON, THOMAS B. GAMMETT, JR,. Constatntine Hutchins, Richard Austin, James W. Wheeler, and William J. Sturgis, Partners Doing Business under the Firm Name and Style of Parkinson & Burr, Plaintiffs,

vs.

THE CITY OF COLUMBUS, OHIO, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck and Fred F. Zimpfer, Members of the City Council of said City, Defendants.

Assignment of Errors.

The above named plaintiffs and appellants now come and make and file this their assignment of errors:

(1) Said District Court erred in dismissing the above entitled cause.

(2) Said Court erred in holding, deciding and decreeing that said cause should be dismissed because the bill does not state facts constituting a cause of action in equity against the defendants or any of them.

(3) Said Court erred in holding, deciding and decreeing
107 that said bill does not state facts constituting a cause of action in equity against the defendants or any of them.

(4) Said Court erred in holding, deciding and decreeing that the facts stated in said bill do not show any federal question for the consideration and decision of the Court.

(5) Said Court erred in holding, deciding and decreeing that said bill does not state any facts which show the Fourteenth Amendment to the Constitution of the United States has been invaded or violated or any right of the plaintiffs under said Amendment has been invaded or violated by the defendants or any of them; and that neither said Amendment nor any right of the plaintiffs thereunder would be invaded or violated by the enforcement by the defendants or any of them of said ordinances mentioned in said bill.

(6) Said Court erred in holding and deciding that said two franchise ordinances mentioned in said bill are respectively contracts which are binding and unalterable, without the consent of the parties thereto, during the terms thereof.

(7) Said Court erred in holding and deciding that said two franchise ordinances each required said The Columbus Railway, Power & Light Company, during the respective terms thereof, to furnish street railway service at the rates of fare therein prescribed.

(8) Said Court erred in holding and deciding that said two franchise ordinances each required said The Columbus Railway, Power and Light Company, during *their* respective terms thereof, to furnish street railway service at the rates of fare therein prescribed, notwithstanding the fact that, by reason of unexpected and changed conditions said rates of fare will not yield sufficient return to said
108 Company to pay its operating expenses, taxes and a proper amount for depreciation of property used in serving the public.

(9) Said Court erred in holding and deciding that said The Columbus Railway, Power and Light Company had not and has not the right to terminate or suspend said two franchise ordinances, or either of them, because of the new conditions resulting from the present war and the increased cost of operation due to said war, which were not foreseen when said ordinances were passed and accepted.

(10) Said Court erred in overruling plaintiff's motion for a temporary restraining order and a preliminary injunction.

(11) Said Court erred in holding, deciding and decreeing that it had and has no jurisdiction in said cause.

(12) Said Court erred in holding and deciding that said bill does not state a case within the jurisdiction of said Court.

(13) Said Court erred in sustaining the motion of the defendants to dismiss this suit.

WILLIAM O. HENDERSON,
HENRY J. BOOTH,
HENDERSON & BURR,
BOOTH, KEATING, POMERENE & BOULGER,
*Solicitors for Plaintiff and Appellant The Columbus Railway, Power & Light Company.*

JOSEPH S. CLARK,
HENRY A. McCARTHY,
*Of Counsel.*

109 And afterwards, to-wit: on the 12th day of November, A. D. 1918, an Entry was made on the Journal of said Court in this cause, which said Entry is clothed in the words and figures following, towit:

Entry (2—344).

*Order Allowing Appeal.*

No. 106.

I. Tucker Burr, Winthrop Burr, A. Lawrence Pierson, Thomas B. Gammett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler, and William J. Sturgis, Partners Doing Busniess under the Firm Name and Style of Parkinson & Burr, Plaintiffs,

vs.

The City of Columbus, Ohio, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred F. Zimpfer, Members of the City Council of said City, Defendants.

Entry.

And now at this term it appearing that the above named plaintiffs have filed their petition for appeal from the order, judgment and decree herein rendered against them and entered on or about the 9th day of November, 1918, to the Supreme Court of the United States and have also filed their assignment of errors pursuant to the rules of said Supreme Court, it is ordered and adjudged that said appeal from said order, judgment and decree be and the same hereby is allowed and granted as prayed for in said petition for ap-
110 peal, upon the plaintiffs giving their appeal bond to the defendants, with sufficient surety, in the penal sum of five hundred dollars ($500), conditioned for costs on appeal according to law.

HOLLISTER, *J.*

And afterwards, to-wit: on the 12th day of November, A. D. 1918, came the Plaintiffs by their Solicitors and filed in the Clerk's Office of said Court, their certain Appeal Bond in this cause, which said Appeal Bond is clothed in the words and figures following, to-wit:

*Appeal Bond.*

Know all men by these presents, That we, I. Tucker Burr, Winthrop Burr, A. Lawrence Pierson, Thomas B. Gammett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler and William J. Sturgis, Partners, doing business under the firm name and style of Parkinson & Burr, as principals, and Maryland Casualty Company, of Baltimore, Maryland, as surety, are held and firmly bound unto The City of Columbus, Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said

City; James J. Thomas, City Clerk of said City; and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck and Fred F. Zimpfer, Members of the City Council of said City in the full and just sum of Five Hundred Dollars, to be paid to the said obligees and their certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

111 Sealed with our seals and dated this 9th day of November, in the year of our Lord one thousand nine hundred and eighteen.

Whereas, lately at a term of the District Court of the United States for the Southern District of Ohio, Eastern Division, in a suit depending in said Court, between said principals and said obligees a decree was rendered against the said principals and the said principals having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said obligee citing and admonishing them to be and appear at a session of the United States Supreme Court to be holden at the City of Washington in the District of Columbia, on the eleventh day of December next.

Now, the condition of the above obligation is such, That if the said principals shall prosecute said appeal to effect, and answer all damages and cost if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

I. TUCKER BURR,
WINTHROP BURR,
A. LAWRENCE PIERSON,
THOMAS B. GAMMETT, JR.,
CONSTANTINE HUTCHINS,
RICHARD AUSTIN,
JAMES W. WHEELER, AND
WILLIAM J. STURGIS,
*Partners Doing Business under the Firm Name and Style of Parkinson & Burr.*
By KARL E. BURR,
*Their Attorney-in-fact.*
MARYLAND CASUALTY COMPANY,
By P. R. JOYCE, *Attorney-in-fact.* [SEAL.]

Sealed and delivered in presence of—
R. K. HUNTER.
L. E. DILLON.

Approved by
HOLLISTER, *Judge.*

112 And afterwards, to-wit: on the 13th day of November, A. D. 1918, there was issued a certain Citation, service of same having been acknowledged, which said Citation is clothed in the words and figures following, to-wit:

*Citation Issued.*

United States Supreme Court.

UNITED STATES OF AMERICA,
*Sixth Judicial Circuit, ss:*

To the City of Columbus, Ohio, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred F. Zimpfer, Members of the City Council of said City, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court to be holden at the City of Washington on the 11th day of December next, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, Eastern Division, wherein I. Tucker Burr, Winthrop Burr, A. Lawrence Pierson, Thomas B. Gammett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler, and William J. Sturgis, Partners doing business under the firm name and style of Parkinson & Burr are appellants and you are appellees to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

113 Witness the Honorable Edward Douglass White Chief Justice of the United States, this twelfth day of November, in the year of our Lord one thousand nine hundred and eighteen, and of the Independence of the United States of America the one hundred and forty-third.

HOLLISTER,
*U. S. District Judge for the Southern District of Ohio.*

Service of the above citation is hereby acknowledged by appellees, this 13th day of Nov. 1918.

HENRY L. SCARLETT.
*City Atty., Counsel for Defts. & Appellees.*

114 *Clerk's Certificate.*

THE UNITED STATES OF AMERICA,
*Southern District of Ohio, Eastern Division, ss:*

I, B. E. Dilley, Clerk of the District Court of the United States, within and for the District and Division aforesaid, do hereby certify

that the foregoing is a true and complete transcript of the proceedings had by and before said Court in the above entitled cause, as the same appears of record and on file in the Clerk's Office of said Court.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Columbus, Ohio, this 18th day of November, 1918.

[Seal United States District Court, Southern Dis. Ohio.]

B. E. DILLEY, *Clerk,*
By C. P. WHITE, JR., *Deputy.*

115 United States Supreme Court.

UNITED STATES OF AMERICA,
*Sixth Judicial Circuit, ss:*

To The City of Columbus, Ohio, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck and Fred F. Zimpfer, Members of the City Council of said City, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court, to be holden at the City of Washington on the* 11th day of December, next, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, Eastern Division, wherein I. Tucker Burr, Winthrop Burr, A. Lawrence Pierson, Thomas B. Gammett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler and William J. Sturgis, Partners doing business under the firm name and style of Parkinson & Burr are appellants and you are appellees to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this twelfth day of November, in the year of our Lord one thousand nine hundred and eighteen, and of the Independence of the United States of America the one hundred and forty-third.

HOLLISTER,
*U. S. District Judge for the Southern District of Ohio.*

*Not exceeding 30 days from the day of signing.

Service of the above citation is hereby acknowledged by appellees, this 13th day of Nov. 1918.

HENRY L. SCARLETT,
*City Atty., Counsel for Defts. & Appellees.*

116 [Endorsed:] Citation and Acknowledgment of Services thereof. Filed Nov. 13, 1918, 10.15 a. m. B. E. Dilley Clerk.

Endorsed on cover: File No. 26825. S. Ohio D. C. U. S. Term No. 739. I. Tucker Burr et al., partners, doing business under the firm name and style of Parkinson & Burr, appellants, vs. The City of Columbus, Ohio, et al. Filed November 20th, 1918. File No. 26825.

DEC 7 1

NO. 739 OCTOBER TERM, 1918

IN THE

# Supreme Court of the United States

---

I. TUCKER BURR, *et al.*
*Plaintiffs and Appellants*

vs.

CITY OF COLUMBUS, *et al.*
*Defendants and Appellees*

---

**Petition and Motion to Advance and to Have Case Heard With Case of Columbus Railway Power and Light Company vs. City of Columbus, et al., No. 715, October Term, 1918.**

KARL E. BURR
JOSEPH S. CLARK
HENRY J. BOOTH
W. O. HENDERSON
*Attorneys and Counsel for Petitioners*

IN THE

# Supreme Court of the United States

October Term, 1918. No. 739

I. TUCKER BURR, *et al.*
*Plaintiffs and Appellants*

vs.

CITY OF COLUMBUS, *et al.*
*Defendants and Appellees*

PETITION AND MOTION TO ADVANCE CASE AND TO HAVE IT HEARD WITH COLUMBUS RAILWAY, POWER AND LIGHT COMPANY VS. CITY OF COLUMBUS, *et al.*, NO. 715, OCTOBER TERM, 1918

*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Now comes I. Tucker Burr, Winthrop Burr, A. Lawrence Pierson, Thomas S. Gannett, Jr., Constantine Hutchins, Richard Austin, James N. Wheeler and William J. Sturgis, plaintiffs and appellants, and file this their petition and motion that the above entitled case be advanced upon the docket of this Court and be heard with the case entitled "The Columbus Railway, Power and Light Company vs. City of Columbus, *et al.*, No. 715, October Term, 1918."

Your petitioners respectfully represent that the following is a brief statement of the matter involved, to wit:

Your petitioners are the holders of more than two hundred thousand dollars ($200,000) of the First Refunding Extension and Sinking Fund Five Per Cent. Mortgage Bonds, issued by the Columbus Railway, Power and Light Company, secured by a First Refunding Extension and Sinking Fund Mortgage covering all of the properties and franchises of the said company; said bonds being dated the first day of April, 1915, and maturing on the first day of October, 1940, and carrying interest at the rate of 5% per annum, payable on the first days of April and October in each year.

Said The Columbus Railway, Power and Light Company owns and operates a system of street railway lines in the City of Columbus, Ohio, and until August 20, 1918, operated said railway lines under two certain franchise grants issued by the City of Columbus to predecessor railway companies, which franchise grants specified the rates of fare to be charged. These rates of fare were reasonable when the grants were issued and accepted, but have become unreasonable and confiscatory by recent very great increases in cost of operation, including particularly the cost of all labor and supplies, due primarily to the present war. These franchise grants require said company to issue eight tickets for twenty-five cents, and to give universal free transfers with the result that said company receives only an average of 2.6 cents for a car ride, counting a ride on a transfer as a separate ride.

On August 20, 1918, said company, having theretofore made various unsuccessful efforts to secure from the City the right to charge higher rates of fare, addressed a written communication to the City setting forth the facts, and stating particularly that the rates of fare had become confiscatory; and by said written statement said company surrendered, cancelled and abandoned these franchise grants and has since said date been a tenant at sufferance upon the streets except for certain perpetual fran-

chise rights in a few of said streets, and said company has since said date been giving street railway facilities to the people of the City of Columbus at an increased fare of five cents for a car ride and one cent for a transfer. Immediately after delivering said written communication to the City, said company instituted a suit in the United States District Court, for the Southern District of Ohio, sitting in equity, by filing a bill therein, asking for an injunction to restrain said city from enforcing said franchise grants and particularly the confiscatory rates of fare therein prescribed. After The Columbus Railway, Power and Light Company instituted said suit, your petitioners, who are citizens and residents either of the State of Massachusetts, or the State of New York, or the State of New Jersey, and therefore non-residents of the State of Ohio, instituted this suit in the United States District Court, for the Southern District of Ohio, by filing the bill herein against the same defendants, asking for a similar injunction.

Your petitioners further represent that their reasons for this application are that this case presents certain questions of great interest and importance at the present time because of the fact that so many street railway companies throughout the country are embarrassed financially and either operating at a loss or unable to pay their fixed charges, this result being due to the very great increases in operating expenses caused by the war, such increases amounting to 100%, 200% and sometimes 300% in certain items; and such companies, in most cases, are unable to secure the consent of the local authorities to make any reasonable increases in their rates of fare, and cannot increase their rates without violating franchise conditions. The questions presented in this case may be properly stated as follows:

1. Does a municipal franchise grant to a street railway company, issued in the year 1901, under the

laws of the State of Ohio, for a term of twenty-five years with specified rates of fare, reasonable when the grant was issued and accepted, but which have become unreasonable and confiscatory by reason of great increases in the cost of operations, bind the street railway company to continue operating its railway lines at a loss under said rates of fare for the balance of the term of twenty-five years, or until said company becomes insolvent and unable to continue its operations under said grant, provided said company has surrendered or attempted to surrender said grant to the city by written instrument addressed and delivered to the proper authorities of the city?

2. Are the rates of fare specified in said grant prescribed rates or agreed rates? *Milwaukee Electric R. & L. Co. vs. Railroad Commission*, 238 U. S. 174.

3. Is not the 14th Amendment a complete protection to the street railway company against the enforcement of such confiscatory rates of fare even if such rates are agreed rates and, if not, then is not the 14th Amendment a complete protection, provided said rates are prescribed rates?

4. The great increases in operating expenses of the Railway Company, being directly due to the war and the developments presenting a situation not within the contemplation and expectation of the city or the railway company when the grant was issued and accepted, is not the court authorized and required to imply a condition in the grant, that such obligations as it imposes were not intended by the parties to continue or to be enforced in the unexpected emergency which has arisen? *Guaranty Trust Co. vs. North German Lloyd Co.*, 244 U. S. 12; *Metropolitan Water Board vs. Dick Kerr & Co.* (1918) Appeal Cases (Eng.), 119 House of Lords, Nov. 26, 1917.

5. Does not an award of the War Labor Board, appointed by the President of the United States, under the authority conferred upon him by Act of Congress, which award increases the wages paid by the Railway Company

annually over 50%, making an annual increased wage payment of $560,000, which causes the company to operate at a loss, present a situation which authorizes and requires the court to imply such a condition in the franchise grant?

6. Will a court of equity enforce specific performance of a franchise grant with specified rates of fare which, although reasonable at the time the grant was issued and accepted, have become confiscatory by changed conditions?

Your petitioners further represent that the President of the United States was authorized by the Act of Congress entitled "An Act Making Appropriations For the Support of the Army For the Fiscal Year Ending June 30th, 1917, and For Other Purposes (Acts of 64th Congress, Chapter 418, U. S. Statutes at Large, Vol. 39, Part I, Public Laws, pages 619, 645)" to take possession and assume control of the transportation systems of the country. The President acted under the authority conferred by this statute by proclamation dated December 26, 1917, and took possession and assumed control of the steam railway lines of the country, stating in said proclamation that nothing therein stated should affect the possession, operation and control of street electric passenger railways and interurban railways, but that if it should be found necessary or desirable later he would take possession and assume control of these street and interurban properties.

Your petitioners further represent that a great many of the street railway companies of the country have requested the President of the United States to exercise the power conferred upon him by Congress and to take them over and operate them because of the very embarrassing situation financially in which they find themselves, due to the great increases in operating expenses caused by the war, but he has not as yet taken favorable action upon any of these requests.

From the foregoing statement it is evident that the questions presented and the issues involved in this case

are almost identical with the questions presented and the issues involved in the case of *The Columbus Railway, Power and Light Company vs. City of Columbus, et al*, No. 715, October Term, 1918, which has been advanced and set down for hearing on January 6, 1919, and on this account your petitioner files this its petition and motion that this case be advanced upon the docket of this Court and be heard with the aforesaid case, No. 715.

And your petitioner will ever pray.

KARL E. BURR
JOSEPH S. CLARK
HENRY J. BOOTH
W. O. HENDERSON
*Attorneys and Counsel for Petitioners*

STATE OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss:*

being duly sworn according to law, deposes and says that he has read the foregoing motion and petition; that he has knowledge of the facts therein set forth, and that the facts therein set forth are true and correct.

Sworn to and subscribed before
me this day of ,
1918.

*Notary Public*

FILE COPY

DEC 28 1918
JAMES D. MAHER,
CLERK.

IN THE

# Supreme Court of the United States

October Term, 1918

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No. 715

THE COLUMBUS RAILWAY, POWER AND LIGHT COMPANY

*Appellant*

vs.

THE CITY OF COLUMBUS, OHIO, *et al.*

---

No. 739

I. TUCKER BURR, *et al.*

*Appellants*

vs.

THE CITY OF COLUMBUS, OHIO, *et al.*

*Appellees*

---

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

---

## Brief for Appellants, Plaintiffs Below

KARL E. BURR
HENRY A. MCCARTHY
JOSEPH S. CLARK
HENRY J. BOOTH
W. O. HENDERSON
*Solicitors for Plaintiffs and Appellants*

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IN THE

# Supreme Court of the United States

October Term, 1918

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No. 715

THE COLUMBUS RAILWAY, POWER AND LIGHT COMPANY

*Appellant*

vs.

THE CITY OF COLUMBUS, OHIO, *et al.*

---

No. 739

I. TUCKER BURR, *et al.*

*Appellants*

vs.

THE CITY OF COLUMBUS, OHIO, *et al.*

*Appellees*

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

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BRIEF FOR APPELLANTS, PLAINTIFFS BELOW

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## STATEMENT OF THE CASE

The Columbus Railway Power and Light Company instituted the first suit by filing its original bill followed by an amended bill against the City and its officers and I. Tucker Burr *et al.* instituted the second suit by filing a

bill against the same defendants. I. Tucker Burr *et al.* are the owners and holders of more than $200,000 of the First Refunding and Extension Sinking Fund Mortgage Five Per Cent. Gold Bonds issued by The Columbus Railway, Power and Light Company. All of these bondholders are citizens of states other than the State of Ohio.

The Columbus Company for some years prior to August 20, 1918, owned the street railway system in the City of Columbus and operated it under two certain ordinances of the City Council of said City adopted in the year 1901, which granted franchises to predecessors of the Columbus Company. Copies of these two ordinances are attached to each of the two bills, marked Exhibits No. 1 and No. 2. Each franchise grant contained a rate schedule requiring the grantee, its successors and assigns, to issue and sell eight tickets for twenty-five cents with universal free transfers. The Columbus Company, under the rate provisions of each of these ordinances, issued and sold eight tickets for twenty-five cents with universal free transfers for a number of years prior to August 20, 1918. On that date the Columbus Company presented a letter of notification to the City of Columbus surrendering and abandoning all of its rights under these two franchise grants and stating as its reason therefor that its operating expenses had increased to such an alarming extent, due primarily to the war, that the rates of fare prescribed in the two franchise grants had become confiscatory, and that, although it had made various efforts commencing in February, 1918, and running down to the time of notice, to secure higher rates from the City Council, it had been unable to secure any relief whatever. The Public Utility Commission of Ohio has no jurisdiction over street railway rates fixed by City ordinance. In surrendering and abandoning these two franchise grants the company reserved all rights under certain perpetual franchises owned by it to operate on certain streets in the city.

The Columbus Company is also engaged in the generation and sale of electricity for light and power purposes and

since the war broke out has furnished power for a great many war industries located in the City of Columbus and in territory adjacent thereto; and the Company has also furnished transportation facilities for the employes of these war industries as well as for a large number of soldiers located at the Columbus Barracks.

In the month of June, 1918, the conductors and motormen employed by the Columbus Company struck for higher wages and, after unsuccessful negotiations, the controversy was referred to the National War Labor Board, which filed its award July 31, 1918, increasing the Company's annual wage account payable to its street railway employees by $560,000. With this large increase in the wage account, coupled with corresponding increases in the cost of all materials and supplies, the Company, immediately prior to presenting its letter to the City Council on August 20, 1918, a copy of which appears as Exhibit No. 3 to the bill in each case, estimated that its operations under the prescribed schedule of rates were not producing enough money to pay its annual operating expenses, depreciation and taxes by about $250,000 so that there would be no possibility of paying its bond interest and no income to yield any return whatever upon the value of the property employed in furnishing street railway service to the people of the City.

The surrender and abandonment of the franchises was based upon the impossibility of furnishing service at the rates of fare prescribed in the franchise grants. Immediately after said surrender and abandonment the company put into operation a new rate schedule requiring passengers to pay five cents for a ride on the cars and one cent additional for a transfer. At the same time the company filed its bill against the City of Columbus *et al.*, being No. 715 upon the docket of this court, and several weeks later I. Tucker Burr *et al.* filed their bill against the City of Columbus *et al.*, being No. 739 upon the docket of this court. The first case, being the one instituted by the Columbus Company, No. 715 upon the docket of this Court, was

heard on September 4, 1918, by Judge WESTENHAVER upon plaintiff's motion for a temporary restraining order and preliminary injunction and upon defendants' motion to dismiss the action. Judge WESTENHAVER overruled plaintiff's motion and sustained defendants' motion. A copy of his opinion appears in the transcript of record of No. 715 at pages 77 *et seq.* The bill in the second case, No. 739, was filed on the 16th day of September, 1918, and was heard on the 10th day of October before Judge HOLLISTER upon a similar motion filed by plaintiffs for a temporary restraining order and preliminary injunction and upon a similar motion filed by defendants to dismiss. Judge HOLLISTER overruled plaintiffs' motion and sustained defendants' motion. Judge HOLLISTER's opinion appears in the transcript of record of No. 739, at pages 53 *et seq.* The two cases were brought by appeal to this Court from the judgments and decrees entered in pursuance of the two opinions mentioned above.

## SPECIFICATIONS OF ERROR

In each of the above-entitled cases the District Court erred in overruling the motion for a restraining order and temporary injunction and in sustaining the motion to dismiss the action and also in holding that the Court had not jurisdiction; the errors of law committed being the following:

(a) In holding that the franchise grants bound the Company to continue to operate thereunder notwithstanding the fact that said grants, according to the natural interpretation of the language used, were permissive only; and

(b) In holding that the obligations of the franchise grants (assuming they imposed obligations to continue to operate thereunder) could be enforced notwithstanding the uncontemplated situation brought about by the war, which resulted in abnormal increases in operating expenses and

so changed the nature of the grants considered as contracts that they became substantially new contracts; and

(c) In holding that the 14th Amendment to the Constitution of the United States was not a protection to the Company against the enforcement of the rate schedules prescribed in the franchise grants.

## ARGUMENT

The claim of the appellees is based upon the proposition that the two franchise grants represent contracts and that these contracts impose obligations upon the Columbus Company to continue operating its street railway lines under these franchise grants and to charge the rates of fare therein prescribed. The position of the plaintiffs and appellants may be summarized as follows:

1. The franchise ordinances granted permission to operate street cars on the streets of the city upon the terms and conditions therein prescribed, and the Company was bound to comply with these terms and conditions so long as it continued to exercise the franchises, but these grants were permissive only, and have been surrendered and abandoned by the Company. Its reasons for such surrender and abandonment were that the rates of fare prescribed in the grants were no longer compensatory, but, on the contrary, had become confiscatory.

2. The situation that has been brought about by the war, resulting in a most unexpected increase in operating expenses of all kinds, and particularly the compulsory annual wage increase of $560,000 due to the award of the National War Labor Board, cannot be held to have been within the contemplation of the parties when the franchises were granted and accepted, and under these circumstances the Company is entitled to a release of the obligations, if any, that these grants may have imposed upon it to continue to operate under them.

3. The 14th Amendment is a complete protection against the enforcement of the confiscatory rates prescribed by the legislative enactments represented by these two franchise grants.

The reason for this controversy is that the rates prescribed by the two franchise grants do not yield enough money to represent a fair return to the company upon its investment. A street railway schedule of rates which requires the company to sell eight tickets for twenty-five cents is an impossible rate schedule under existing conditions; under any conditions it is extremely low. The figures shown in the bills in these two cases disclose the fact that for each ride on the street cars, including a ride on a transfer as a separate ride, the company receives an average of 2.6 cents per passenger.

The amount of bonds properly chargeable against the street railway lines was figured in the bill filed in case No. 715 at $7,295,000. This represents a part only of the entire outstanding bonds of the company. Another and more accurate basis of figuring, which was adopted when the bill in No. 739 was filed, shows that the amount of bonds properly chargeable against the street railway lines was $8,600,000. The only material difference, for the purposes of these cases, that this difference in figures makes, is that the amount by which the company failed to earn its interest on the bonds properly chargeable against the street railway lines for the twelve months ending June 30, 1918, in the first case was shown to be $31,000, and in the second case approximately $100,000. In the first case the figures showed that for the year named the company earned barely enough to pay 2½% upon the value of its property employed in furnishing street railway service to the people of the city. In Judge WESTENHAVER's opinion the figure is named several times as 4½%. This was an error and not borne out by the allegations of the bill. The statement for the year ending June 30, 1918, was bad enough under any circumstances, but the estimates for the year ending June 30, 1919, after the War Labor

Board had increased the annual wage account by about $560,000, shows a very distressing situation. It appears by these estimates that the company will fall short annually by approximately $250,000 of paying its operating expenses, depreciation and taxes and that there will be nothing left with which to pay interest on bonds, or to represent any return whatever to the company upon its invested capital. This situation necessarily spells impending bankruptcy and this is alleged in the bills.

Questions of jurisdiction are presented at the threshold of these cases. The jurisdiction of the Federal Court is denied by defendants and also jurisdiction in equity.

## I

## JURISDICTION OF THE FEDERAL COURT

Appellants contend that in each case the bill presents a Federal question and jurisdiction is claimed on that account. This Federal question arises out of the 14th Amendment. Appellants contend that the 14th Amendment is a complete protection against the enforcement of the confiscatory rates of fare prescribed by each of the two franchise grants. The Company does not claim the benefits of these grants. On the contrary, it has surrendered and abandoned them and it is not therefore in a position where the appellees can claim that it is undertaking to retain the benefits of the two grants and to deny liability to meet their burdens. These two grants are legislative enactments of the City under delegated power. They are laws enacted by the City under authority delegated to it by the State. The 14th Amendment prohibits the States from making or enforcing any law which shall abridge the privileges or immunities of citizens, and from depriving any person of life, liberty or property without due process of law. Such deprivation may be caused by making or enforcing a law or by any other action of the State or of the City under State authority. In this particular case the deprivation of which the

appellants complain is the threatened enforcement of the two laws, evidenced by the two franchise ordinances. The nature of the ordinances and of the obligations imposed by them is fully discussed below under a separate heading, and also under another separate heading the application of the 14th Amendment is discussed. Appellants present with confidence the proposition that the 14th Amendment is a complete protection to them against the enforcement by the appellees of the franchise grants with their confiscatory rate schedules but, if for any reason appellants are mistaken in this contention, it does not follow that the Federal Court has not jurisdiction. On the contrary it is well settled that, if the Federal question presented is a real question, as distinguished from a fictitious question, presented for the purpose of conferring jurisdiction, the Court will retain jurisdiction, even though it may decide the Federal question against the contention of the party presenting it, or even though it may omit to decide the Federal question at all, but may settle the issues between the parties by deciding some local or state question that is also presented. These propositions are fully sustained by the following cases:

*City Railroad Co. vs. Citizens' St. Ry. Co.*, 166 U. S. 557, 563;

*Penn Mutual Life Ins. Co. vs. Austin*, 168 U. S. 685, 694;

*Siler vs. Louisville & Nashville R. R. Co.*, 213 U. S. 175, 191;

*Ohio Tax Cases*, 232 U. S. 576, 586;

*Greene vs. Louisville Interurban & R. Co.*, 244 U. S. 499, 508;

*Des Moines City Railway Co. vs. City of Des Moines*, 151 Fed. 854, 859.

Judge WESTENHAVER in his opinion in Case No. 715 (Record, p. 86) recognized the soundness of the proposition for which the above cases are cited, but held that the alleged Federal question upon which appellees rely for the jurisdic-

tion of the Federal Court is only a fraudulent and fictitious Federal question. In support of this view he cites the following cases:

*Penn Mutual Life Insurance Co. vs. Austin,* 168 U. S. 685;

*St. Paul Gas Light Co. vs. St. Paul,* 181 U. S. 142;

*Defiance Water Co. vs. Defiance,* 191 U. S. 184;

*Barney vs. New York,* 193 U. S. 430;

*Des Moines vs. Des Moines &c. Railway Co.,* 214 U. S. 179.

The case of *Penn Mutual Life Insurance Company vs. Austin,* 168 U. S. 685, is one of the cases upon which we rely to sustain the jurisdiction of the Federal Court. The law is stated as we have stated it above, but the decision in that case was based upon the *laches* of the plaintiffs. All of the jurisdictional questions were for the purposes of the argument admitted, and the bill was dismissed on the ground of *laches* only.

In *St. Paul Gas Light Co. vs. St. Paul,* 181 U. S. 142, the company claimed that it had a contract, the obligation of which was impaired by a city ordinance. The difficulty with the plaintiff's case was that the city ordinance which it claimed impaired the contract was not a legislative act of the city under delegated State authority. It was not a subsequent act of legislation impairing a prior contract, and it is elementary that under such circumstances the contract impairment clause of the Federal Constitution does not apply. The ordinance in question directed the company to remove some lamp posts from the streets, and contained a declaration that the city did not intend thereafter to pay the company interest on the cost of construction of the lamps so directed to be removed. If this ordinance had been a legislative enactment, the Federal Court would have had jurisdiction. In the present case there is no doubt that

the franchise grants which the appellees threaten to enforce are legislative enactments and therefore State action, and within the prohibition of the 14th Amendment.

In *Defiance Water Company vs. Defiance*, 191 U. S. 184, plaintiff claimed protection under the contract impairment clause, but failed to sustain jurisdiction for the same reason as in the St. Paul case above, that is, the alleged impairment was not by any subsequent act of legislation. The Court said:

> "Clearly, this resolution was not a law impairing the obligation of the contract. It was merely the allowance of a claim for rentals, with a saving clause to prevent estoppel."

In *Barney vs. New York*, 193 U. S. 437, the plaintiff claimed protection under the due process clause of the 14th Amendment, but failed to sustain the jurisdiction of the Court because the act which he sought to have enjoined was not action by the State. The opinion discussing the 14th Amendment says (p. 437):

> "But that amendment prohibits deprivation by a State, and here the bill alleged that what was done was without authority and illegal."

And again (p. 437),

> "Thus, the bill on its face proceeded on the theory that the construction of the easterly tunnel section was not only not authorized, but was forbidden by the legislation, and hence was not action by the State of New York within the intent and meaning of the 14th Amendment, and the Circuit Court was right in dismissing it for want of jurisdiction."

In *Des Moines vs. Des Moines &c. Railway Co.*, 214 U. S. 179, Mr. Justice HOLMES, delivering the opinion, said (p. 183):

> "The ground of jurisdiction is that a resolution of the city council of that city is a law impairing the obligation of contracts within the meaning of the Constitution of the United States, and, if carried out, will take the property of the corporation without due process of law, contrary to the 14th Amendment."

The resolution upon which plaintiff relied as a law was then quoted, and the opinion continues (p. 184):

> "We are of opinion that this is not a law impairing the rights alleged by the appellee, and therefore that the jurisdiction of the Circuit Court cannot be maintained. Leaving on one side all questions as to what can be done by resolution, as distinguished from ordinance, under Iowa laws, we read this resolution as simply a denial of the appellee's claim, and a direction to the city solicitor to resort to the courts if the appellee shall not accept the city's views."

If the State or city action which is alleged to impair a contract is not a subsequent act of legislation, jurisdiction does not attach under the contract impairment clause, and if it is not action by the State or by the city under delegated authority, jurisdiction does not attach under the due process clause.

It seems to us that all of these cases relied upon by Judge WESTENHAVER can be readily distinguished from the present two cases for the reasons stated above. The franchise grants here involved are clearly legislative enactments and the threatened enforcement of the rate schedules therein prescribed is threatened enforcement of a law; and, on that account, a Federal question is presented. If these franchise grants were simply contracts instead of being legislative enactments, there would be no basis for the application of the 14th Amendment and on that account the Federal Court would not have jurisdiction. The fact that these franchise grants are legislative enactments is fully established by the

authorities. See the case referred to, *infra*, page 24, where the nature of these grants is considered; also the following cases:

*St. Paul Gas Light Co. vs. St. Paul*, 181 U. S. 142, 45 L. E. 788;

*Dawson vs. Columbia &c. T. Co.*, 197 U. S. 177, 49 L. E. 713;

*Cincinnati vs. Cincinnati & H. T. Co.*, 245 U. S. 446, 62 L. E. 170.

In the second case, No. 739, in which certain bondholders of the Columbus Railway, Power and Light Company are plaintiffs, jurisdiction in the Federal Court is claimed not only upon the ground that a Federal question is involved, but also because of diversity of citizenship.

In case No. 739, counsel for appellees in their argument below suggested a defect of parties because the company was not made a party and because neither the trustee of the mortgage nor the holders of the other bonds nor the mortgagor were made parties. No defect of parties was made a ground of appellees' motion to dismiss the action or the decree of dismissal. There is, we submit, no merit in the suggestion of counsel for appellees, since, under what we understand to be the established rule of this Court and of the other Federal Courts, the plaintiffs were entitled to bring and maintain the action without prejudice to the trustee or the other bondholders, and the mortgagor, the Columbus Company, was not an indispensable party.

*Equity Rule No. 39*;

11 *Cyc.* pp. 866-7;

1 *Foster's Fed. Prac.*, pp. 436-7;

*Payne vs. Hook*, 4 Wall. 425;

*Omaha Hotel Co. vs. Wade*, 97 U. S. 13;

*Old Colony Trust Co. vs. Omaha*, 230 U. S. 100;

*Mercantile Trust Co. vs. Texas & P. Ry. Co.*, 51 Fed. 529;

*Ex parte Haggerty, et al.*, 124 Fed. 441;

*Carter vs. Fortney*, 170 Fed. 463; affirmed in 203 Fed. 454;

*Sioux City Terminal R. & W. Co. vs. Trust Co. of North America*, 182 Fed. 124;

*Hubbard vs. Galveston, etc., R. Co.*, 200 Fed. 504;

*Toledo Tr., L. & P. Co. vs. Smith*, 205 Fed. 643;

*De Pauw University vs. Public Service Commission*, 247 Fed. 183.

There is nothing to the contrary in the case of *Dawson vs. Columbia &c. T. Co.*, 197 U. S. 177, 49 L. E. 713. That was a suit by a mortgage trustee against the City of Dawson, and the mortgagor company was also named as a party defendant. Jurisdiction depended solely upon diversity of citizenship. The court said:

> "The Water Works Company (the mortgagor) is admitted to have been a necessary party and it, like the defendant city, was a Georgia corporation. * * * There was a pretence of asking relief against it, as we have stated, but no foundation for the prayer was laid in the allegations of the bill. * * * No difference, or collision of interest, or action is alleged or even suggested. If we assume that the plaintiff is more than an assignee of the city's contract to it (which we do not intimate) still, when the arrangement of the parties is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist, the device cannot be allowed to succeed (citing a number of cases)."

## II

## JURISDICTION IN EQUITY

Equity has jurisdiction to hear and determine these two cases. This question of jurisdiction is settled by this Court in the following cases:

*Smyth vs. Ames*, 169 U. S. 466, 517;
*Detroit vs. Detroit Citizens Ry. Co.*, 184 U. S. 368;
*Cleveland vs. Cleveland Ry. Co.*, 194 U. S. 517, 531.

In speaking of jurisdiction in equity, Judge WESTENHAVER said (Record, No. 715, p. 79):

> "The nature of the threats made and the means to which it is expected the city will resort to enforce its threats are not stated or shown."

And again (p. 86):

> "No threatened action of the city authorities is complained of, except that it may endeavor to enforce compliance by complainant with its contract. No charge is made that other than legal methods will be adopted for that purpose, and, in the absence of a statement clearly showing a threatened resort to illegal means, a Court must assume that the city officials will proceed in conformity to law."

The amended bill in No. 715, Section 14 (Record, p. 48) contains the following:

> "The plaintiff further charges that the defendants threaten, and will, unless restrained and enjoined by this Court, attempt to force it to continue to operate its street railway lines under said Blanket Franchise and said Central Market Franchise upon all of the streets of said city, including those streets covered by

the aforesaid perpetual franchises, and to force it to continue to issue and sell eight tickets for twenty-five cents and give universal free transfers; and that said threat of the defendants, if carried out, would compel the plaintiff to carry passengers upon its said lines at inadequate and confiscatory rates, in violation of said Fourteenth Amendment to the Constitution of the United States."

A similar averment appears in Section 16 of the bill in No. 739 (Record, p. 9). Section 17 in the amended bill in No. 715 (Record, p. 49) reads as follows:

> "The plaintiff further says that this amended bill of complaint presents a case within the jurisdiction of this court of equity in view of the controversies, confusion, risks and multiplicity of suits which would necessarily be occasioned by the resistance of the plaintiff to the enforcement of the inadequate and confiscatory rates of fare prescribed in the aforesaid two franchise ordinances, and that, in view of the public interests and the great number of people to be affected thereby, only a court of equity is competent to meet such an emergency and to determine once and for all and without a multiplicity of suits, matters that affect not only individual persons, but also the interests of the entire community in the use of the public streets of the City of Columbus and in the administration of the affairs of the plaintiff, a quasi-public corporation, operating lines of street railway in said streets."

Section 19 of the bill in No. 739 (Record, pp. 9, 10) contains the same averment.

A similar situation was presented by the bills therein filed in each of the three cases cited above. It was not stated in any one of the bills in those three cases that the city proposed to pursue any particular course to enforce the provisions of the objectionable legislation. It was enough to

confer jurisdiction in equity to show a situation such as is outlined in the above quoted Section 17 of the bill in No. 715 and in Section 19 of the bill in No. 739. Controversies, confusion, risks and multiplicity of suits are inevitable in any such situation. It is also evident that the public interests and the interests of a great number of people are affected; in fact the entire community. It is also of common knowledge that the property of such a public service company is and must be largely in the public streets and highways of the city, and so easily subject, in case of riot or other disturbance, to attack and destruction. The process of a court of law is not suitable to meet such a situation. Riders on the street cars may refuse to pay more than the stipulated rates and for failure to pay the rates charged by the company may be ejected. Suits may result. Punitive measures may be adopted by the city officers. Many emergencies may arise which only a court of equity is able to meet. The situation in Columbus is well shown by the letter of the Mayor to the President of the United States (Record No. 739, pp. 40, 41). As therein stated in substance present conditions are serious and threaten the general peace of the city; only the moment, the man and the incident may be necessary to cause an explosion; thousands of people are riding in the cars without paying fares and the company has instructed its conductors not to put them off, for the conductors are not equipped to handle irritated passengers who want to argue their rights, and that there is great danger of serious trouble.

The bills in these two cases pray for injunctions to restrain the defendants from enforcing the rate schedules prescribed in the two franchise ordinances and from enforcing the ordinances or any provision of either of them. The company could not afford to wait for the city to commence proceedings to enforce these rate schedules or any other provision of the ordinances, for the serious condition outlined above was presented immediately upon the surrender and abandonment by the company of the franchise

grants and its putting into effect the increased rates. The company was advised that it was fully justified in taking this course and its immediate interests demanded that this should be done. It had done its best to secure relief from the City Council by continuous and persistent efforts to this end from February to August 20, 1918, without favorable result, or any prospect thereof. The only way that the situation could be adequately met was by the course which the company took, that is, the surrender and abandonment of the two franchises, the putting into effect of the increased rates and the filing of a bill in the Federal Court. All of the issues presented between the parties in the two cases, respectively, were properly before that court and it had full right and jurisdiction to hear and determine them. There is no merit in the suggestion that upon the main issues involved the city should have been the plaintiff and the company the defendant; nor, in the further suggestion, that the company, having broken its contract, has no standing as complainant in equity.

## III

## NATURE OF THE OBLIGATIONS IMPOSED UPON THE RAILWAY COMPANY BY THE TWO FRANCHISE ORDINANCES

The appellees contend that the ordinances, being franchise grants, are contracts and that the company is obligated by their terms to operate its cars at the prescribed rates for the remainder of the period therein named, to wit, twenty-five years. As the franchise grants were issued in the year 1901 they would expire by limitation in 1926. The appellants do not deny that the franchise grants were contracts controlling the rates of fare so long as they continued in existence, nor that the company, so long as it retained the franchises, was bound by these rates. The issue between the parties is whether the grants imposed any obligation upon the company to continue to exercise the rights and

privileges granted and to charge the prescribed rates for the remainder of the term named in the grants.

The legislation, in pursuance of which the city acted in granting these franchises, was incorporated in Sections 2501, 2502, 2504, 2505, 2505-b, 3443 and 3443-12, Bates Annotated Statutes of Ohio, Revisions of 1897 and 1902. These sections are copied in full in the margin of the case of *Cleveland vs. Cleveland City Railway Co.*, 194 U. S. 531. The most important section for consideration here is section 2501, which provides that no corporation shall construct a street railway until application for leave is made to the city council,

> "and the council by ordinance shall have granted permission and prescribed the terms and conditions upon and the manner in which the road shall be constructed and operated, and the streets and alleys which shall be used and occupied therefor, but the council may renew any such grant at its expiration upon such conditions as may be considered conducive to the public interest."

Section 2502 provides that no grant shall be made except to the corporation "that will agree to carry passengers upon such proposed railroad at the lowest rate of fare."

Section 3443 provides that the "council or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such railways may be constructed, operated, extended and consolidated."

The other sections and the other parts of the sections mentioned are not important for the purposes of the present case.

Turning now to the ordinances which are attached as Exhibits Nos. 1 and 2 to the bill and also to the amended bill in case No. 715 and to the bill in case No. 739, it is noted that the grant to The Columbus Railway Company, Exhibit No. 1, is a renewal grant. Before this grant issued the grantee owned and operated its lines of railway in the city under certain older franchise grants, which expired at

various dates, including certain perpetual franchises, and this particular franchise, known as the "Blanket Franchise," was granted and accepted in order that these franchises might be consolidated into one and all expire at the same date (excepting only the perpetual franchises, all rights under which were reserved under Section 20) and also to provide that the terms and conditions of the several grants should be made consistent. It will be noted that Section 2501, from which we have quoted above, provides that the city council shall prescribe the "terms and conditions" for the construction and operation of a street railway, but that if the grant is a renewal grant it may be renewed upon such "conditions" as may be considered conducive to the public interest. The phrase "terms and conditions" is used in the first instance and the word "conditions" in the second. They probably mean the same thing, although this language supports the suggestion that a renewal franchise grant is a grant upon condition. This is the view taken by the Supreme Court of New Jersey in *Collingswood Sewerage Company vs. Borough of Collingswood*, 102 Atl. 901, in which the third paragraph of the syllabus reads as follows:

> "An ordinance granting consent of a municipality to the incorporation of a sewerage company under the Act of 1898 and fixing maximum and minimum rates is a grant upon condition rather than a contract."

The important point to be noticed about these franchise ordinances is that the grants are strictly permissive. Section 1 of Ordinance Exhibit No. 1 provides that the franchises rights and privileges

> "be and the same are hereby renewed to said the Columbus Railway Company, its successors and assigns, for and during the term of twenty-five years from and after the passage of this ordinance; and the said the Columbus Railway Company is, and its successors and assigns are, hereby granted the franchise

and right, and are hereby authorized and empowered to maintain and operate its lines of street railroad upon and over each and all of said streets and avenues," etc.

In the rate schedule, Section 21, the grant provides that the company "shall be entitled to charge fares," etc. There is nothing in the ordinance indicating that the company *agrees* to do anything. By its acceptance of the ordinance the grantee bound itself to comply with the terms and conditions so long as it exercised the rights and privileges granted. The only place where the term of twenty-five years is mentioned is in that part of Section 1 quoted above, which provides that the former franchises are renewed "for and during the term of twenty-five years," and that the company is granted the franchise and right "for said term of twenty-five years." This does not evidence an agreement by the company. It expresses the limit of time beyond which the franchise shall not last. The acceptance of this grant appears in the Record of No. 739, page 50. The Columbus Railway Company, grantee in ordinance Exhibit No. 1, accepted "each and all of the terms, provisions and requirements of the ordinance," describing the ordinance as the one renewing to The Columbus Railway Company for a term of twenty-five years its grants, rights, privileges and franchises. The same acceptance of the terms, provisions and requirements appears twice at subsequent points in the acceptance.

In the absence of any express agreement on the part of the Columbus Railway Company, grantee, to continue to exercise the rights and privileges granted, the grantee did not make any such agreement or contract unless it can be implied from the acceptance of the grant.

The ordinance, Exhibit No. 2, is not so elaborate as No. 1. It grants the permission of the city to the grantee to construct and operate and recites that notice was given and bids advertised for and received and that the Central

Market Company bid and agreed to carry passengers upon the proposed road at the lowest rate of fare. It is important to note that the grant also is permissive. Section 1 provides that The Central Market Street Railway Company

> "be and is hereby granted permission and authorized to construct, operate and maintain a street railway in and upon the following streets in the City of Columbus, Ohio, to-wit."

Section 15 contains a rate schedule and provides that the company "shall be entitled to charge fares as follows." This franchise grant, like the other one, is permissive and there is nothing in it which indicates an agreement on the part of the company to continue to exercise the privileges granted for the term of twenty-five years therein named. The acceptance of the grant appears at page 51 of the Record in No. 739. There appears to have been a formal acceptance addressed by the President of the Company to the Board of Public Works and City Council, under date January 22, 1901, which states that the company "hereby accepts the terms and conditions of the ordinance," etc., and also a resolution of the Board of Directors adopted the same day by which the Board accepted "the terms and conditions of said ordinance." The term of twenty-five years is not mentioned either in the acceptance addressed to the Board of Public Works and City Council nor in the resolution. In the absence of any express agreement in the ordinance or its acceptance to continue to exercise the franchises and privileges granted for the term of twenty-five years therein named, if the company entered into any such contract or agreement it must be implied from the acceptance of the grant of the franchise.

Franchise grants of this kind have been the subject of consideration by this court in a great many cases. The case that naturally should receive the first consideration is *Cleveland vs. Cleveland City Railway Company*, 194 U. S. 517, 48 L. E. 1102, because in that case the court

considered certain franchise grants made by the City of Cleveland acting under the same statutory authority. In that case the Railway Company claimed protection under the contract impairment clause of the Federal Constitution against an attempted reduction by city ordinance of the rate schedule prescribed in a prior ordinance under which the said company was operating. The issue was whether the rate schedule in the prior ordinance was a contract and particularly whether the city had the power to enter into such contract. The court said (p. 534) that the statutes lodged in the city

> "comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended and consolidated"

and, further (p. 535),

> "We can see no escape from the conclusion that the ordinances were intended to be agreements binding upon both parties, definitely fixing rates of fare which might be thereafter charged,"

also (p. 538),

> "Concluding, as we do, that the ordinance of 1898 impaired the obligations of contracts entered into by the City of Cleveland fixing the rate of fare to be charged on the lines of railroad operated by the complainant, the decree of the Circuit Court * * * is therefore affirmed."

The court also said (p. 534)

> "that in passing ordinances based upon the grant of power referred to, the municipal council of Cleveland was exercising a portion of the authority of the state as an agency of the state cannot in reason be disputed."

This Cleveland case has been referred to a number of times by counsel for the appellees, also by Judge WESTENHAVER in his opinion in No. 715, and by Judge HOLLISTER in his opinion in No. 739. On this account we have spoken of the case in detail, although we do not think that it is of any particular importance in connection with the real issues involved in the present case. Judge WESTENHAVER says (Record, No. 715, p. 80):

> "The primary and controlling question, in my opinion, depends on the nature of the relation created between the complainant and the city by these franchise grants. This relation is settled beyond controversy by numerous decisions of the Supreme Court of Ohio and of the Supreme Court of the United States."

He then refers to Section 2501 and the other sections referred to above, and cites certain Ohio cases and certain cases decided by this court, stating that the holding in these cases is uniform, and refers particularly to this Cleveland case in 194 U. S. 517. On page 81 he quotes a paragraph from the Cleveland case. The opinion proceeds on page 82 as follows:

> "No question is made but that the franchise grants now being considered did by their terms purport to create a binding contract as to the rate of fare for a term of twenty-five years. It follows from this settled law that a contract has been engendered, mutually binding upon the city and upon the owner of these franchises; that this contract requires the owner during the entire term of twenty-five years to furnish street railway service at the rates of fare therein provided, and that neither the complainant nor the city during this term has the right to change or alter that rate without the consent of the other. * * * It is equally the duty of the courts to uphold these contracts and vindicate the law when it is the grantee

> therein, and not the city which is seeking to change the terms thereof without the consent of the other party."

There is nothing in the Cleveland case nor in any of the other cases cited by Judge WESTENHAVER which sustains his conclusion that the franchise contract requires the grantee or its successors "during the entire term of twenty-five years to furnish street railway service at the rates of fare therein provided." This conclusion results from his erroneous construction of the franchise ordinances, for neither ordinance contains any covenant, express or implied, to furnish street railway service either during the entire term or for any period. An examination of the cases cited by Judge WESTENHAVER shows very clearly that no one of them supports his conclusion in this point.

Judge HOLLISTER also seems to think that the Cleveland case in 194 U. S. 517, settles this issue. In his opinion (Record No. 739, page 55) he considers the suggested difference between agreed rates and prescribed rates and quotes the following from the opinion in the Cleveland case:

> "We can see no escape from the conclusion that the ordinances were intended to be agreements binding upon both parties definitely fixing the rates of fare which might be thereafter charged."

We are quite in accord with everything decided in the Cleveland case, but we deny that it is authority for the conclusion that the grantee in a franchise grant, in the absence of express words imposing such an obligation upon the grantee, is bound to continue to operate under the grant for the period therein named when the rates of fare therein prescribed have become confiscatory.

Although these franchise grants are properly designated contracts, accurately speaking they are legislative enactments. They are laws of the city enacted in pursuance of authority delegated to the city by the State. This is recognized in the Cleveland case, as shown by the

last of the quotations above from said case. We doubt whether counsel for the city will deny that these franchise grants are legislative enactments, for this point has become well settled by numerous decisions in this Court.

*Wright vs. Nagle,* 101 U. S. 791, 25 L. E. 921;

*Hamilton Gas Light & Coke Co. vs. City of Hamilton* (an Ohio case), 146 U. S. 258, 36 L. E. 963;

*City Railway Co. vs. Citizens Street R. Co.,* 166 U. S. 557, 41 L. E. 1114;

*Penn Mutual Life Insurance Co. vs. Austin,* 168 U. S. 685, 42 L. E. 626;

*Walla Walla vs. Walla Walla Water Co.,* 172 U. S. 1, 43 L. E. 341;

*St. Paul Gas Light Co. vs. St. Paul,* 181 U. S. 142, 45 L. E. 788;

*Home T. & T. Co. vs. Los Angeles,* 211 U. S. 265, 53 L. E. 176;

*Grand Trunk W. R. Co. vs. South Bend,* 227 U. S. 544, 57 L. E. 633;

*Owensboro vs. Cumberland T. & T. Co.,* 230 U. S. 58, 57 L. E. 1389;

The Ohio cases are to the same effect:

*State ex rel. vs. Cincinnati G. L. & C. Co.,* 18 Ohio St. 262, 292;

*Hamilton G. C. & Tr. Co. vs. Hamilton & L. Tr. Co.,* 69 O. S. 402.

In most of these cases the railway company or other public utility appealed for protection under the contract impairment clause of the Federal Constitution against an attempted impairment of its contract. There have been, of course, a great many other cases of this kind in this Court

where the protection of the contract impairment clause has been claimed. Among these cases may be mentioned:

*Freeport Water Co. vs. Freeport*, 180 U. S. 587, 45 L. E. 769;

*Detroit vs. Detroit Citizens Street R. Co.*, 184 U. S. 368, 46 L. E. 492;

*Minneapolis vs. Minneapolis Street R. Co.*, 215 U. S. 417, 54 L. E. 259;

*Milwaukee Electric R. & L. Co. vs. Railroad Commission*, 238 U. S. 174, 59 L. E. 1254;

*Detroit United Railway vs. Michigan*, 242 U. S. 238, 61 L. E. 268;

*Puget Sound T. L. & P. Co. vs. Reynolds*, 244 U. S. 574, 61 L. E. 1325.

Sometimes the attempted impairment has been by subsequent ordinance of the City Council and sometimes by order of a Public Utility Commission created by the State for the purpose of regulating rates. These cases have no direct bearing upon the issues presented in the present cases. They settle the point that the right to regulate rates is a governmental function vested in the Legislature very analogous to the police power. The Legislature has the right to authorize municipalities to enter into term contracts with public utilities prescribing rates, but the rates prescribed in any such contract will not bar the State or prevent it from subsequent rate regulation unless the State has expressly authorized the municipality to make such contracts with respect to rates.

It is quite clear under these authorities that the City of Columbus was not authorized by the State of Ohio to bind the state by any rate schedule that it might insert in a franchise grant. Counsel for the appellees in the present cases contend that the company should be bound by the rate schedules prescribed in the two franchise grants because the city is bound, arguing that if the rates had turned out to be

too high instead of too low, the city could not have changed them. Although the city was bound, the state was not and could vest the Public Utility Commission with authority to regulate the rates prescribed in municipal franchise grants, and that Commission acting under that authority could direct the company to lower its rates, if they should be too high, so that in this way the public could be given full protection. The absence of such legislation shows that no such emergency has arisen.

The contract impairment cases, where the alleged impairment is by city ordinance, are interesting from another standpoint. They necessarily hold that such city ordinances are subsequent acts of legislation. These cases are, therefore, authority, if further authority is required, to sustain the position that the ordinances in the present cases are legislative enactments.

While these franchise grants, although accurately speaking legislative enactments, may properly be called contracts, limited however as hereinbefore stated, appellants do not at all concur in the conclusion reached by Judges WESTENHAVER and HOLLISTER that this ends the controversy. The contracts must be interpreted. The real issue here is whether they obligate the grantees and their successors to continue operations under them at the prescribed rates for the full term of twenty-five years, or whether that period is anything more than the term designated by the city beyond which the franchises may not be be exercised. Attention has already been called to the language of these franchise grants. There is no covenant or agreement expressed or implied, and nothing in them that looks like an agreement on the part of the grantee to continue operations under them for the term named. If they evidence any such agreement it must be implied on the theory that the city offered the franchises upon the terms and conditions named and for the period named, and that the grants were accepted. Such an acceptance is more consistent with an understanding that the privileges granted

may be surrendered at any time than with the theory that by accepting them the grantee assumed a binding obligation to continue operations under them for the term named. If it had been the intention of the city to bind the grantee to continue to serve the public by the exercise of the privileges granted for the term prescribed, it would have been very easy for the city to have inserted in these grants appropriate language to that effect. The absence of any such language shows, we submit, that there was no such intention. The character and importance of a covenant or agreement to operate for the full term, if there were any intention to that effect, is such as to preclude the possibility of its having been either overlooked or inadequately stated in the franchises; for such a covenant or agreement is the most important and far-reaching provision that could have been embodied in the ordinances. Such covenants or agreements are sometimes contained in franchise grants. They are not contained in the franchises under consideration. The inference is obvious.

There is no basis for implying any such agreement from anything that appears in the franchise grants or in the acceptance of either. Obligations are not raised by implication unless there is something in the written instrument showing an intention to impose such an obligation. These franchise grants and their acceptances are far more consistent with the contention of the appellants that they were permissive and could be surrendered at any time, particularly if there was any adequate reason.

In 15 *A. & E. Enc. of Law, 2nd Ed.*, under the heading "Implied or Quasi Contracts," page 1078, the author, in speaking of implied agreements, says:

> "The implication, of course, must be a reasonable deduction from all the circumstances and relations of the parties."

In 13 *Corpus Juris*, under the heading "Contracts," page 559; the author says:

> "In order that an unexpressed term may be implied the implication must arise from the language employed in the instrument or be indispensable to effectuate the intention of the parties. * * * A term which the parties have not expressed is not to be implied merely because the court thinks it is a reasonable term."

In *Caverly-Gould Company vs. Springfield*, 83 Vt. 396; 76 Atl. 39, the court was called upon to construe the vote of a town exempting from taxation all manufacturing establishments investing over $5,000, "established and put in operation in the town during the then succeeding twelve months." It held that a party who accepted such a vote and complied with its requirements

> "did not forfeit its right to exemption by ceasing to do business and leasing its real estate to another corporation, which was organized and conducting a different business long before the vote was passed, and not itself entitled to exemption."

The fifth point in the syllabus reads as follows:

> "The court may not, by implication, put into a written instrument what the parties have left out of it, though by mistake, nor reject what they have put into it, unless repugnant to some other part."

The court said (p. 42):

> "Following these rules as we must, it is obvious that we cannot read into this vote what we are asked to, for there seems to be no reasonable doubt about its meaning. Its language is neither obscure, imperfect nor ambiguous, but is plain, complete and explicit, and was evidently chosen with care and consideration, so

> it is not fairly open to construction and we see no warrant for saying that the town left, or intended to leave, anything to implication, but think that it expressed, and intended to express, all it wanted to ask of those who accepted its offer, and that the orator had a right to understand it so."

The defendant still owned the factory although it was leased to another and his defense, stated above, to a claim for taxes was sustained. The court denied the claim of plaintiff that an implied agreement must be read into the vote to the effect that a party could not escape the tax unless he not only constructed his factory but continued to operate it for the term named.

The Court in the last cited case, relied in part upon the decision of this Court in *Del. & Hudson Canal Co. vs. Penna. Coal Co.*, 8 Wall., 276, in which Mr. Justice CLIFFORD, delivering the opinion of the Court, said:

> "Undoubtedly, necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed, but omissions or defects in written instruments cannot be supplied by virtue of that rule unless the implication results from the language employed in the instrument, or is indispensable to carry the intention of the parties into effect."

And again said:

> "Examined in the light of the rules here suggested, the court is of the opinion that the articles of agreement set forth in the declaration contain no such covenants as those alleged by the plaintiffs as the foundation of their claim; that the terms of the agreement do not support the allegation that the defendants ever made any such covenants, nor that they ever agreed to pay toll except for coal actually transported under the agreement."

If these franchise grants, instead of providing for a term of twenty-five years, had contained no time limitation, there would be even less, and, in fact, practically no basis for the raising of an agreement by implication to continue to operate under them. Such indeterminate franchise grants carry with them the idea that they may not last perpetually or for any definite term provided some adequate reason develops for terminating them, notwithstanding the fact that in the absence of such adequate reason they may be properly designated perpetual. Any such indeterminate grants may be terminated either by the municipality or by the street railway company for adequate cause. The fact that a term of twenty-five years is named in a franchise grant ought not to make any difference in the interpretation of the grant, in respect to any implied obligation resting upon the grantee or its successor to continue to operate thereunder. If there is any express agreement either in the grant or in its acceptance, the situation naturally is different. We are now dealing with implied agreements only. In considering whether an agreement of this kind should be implied, we must not overlook the effect that such an implied agreement would have. It would amount to an agreement which would, under existing circumstances, prevent the company from performing its public duties. The enforcement of such an agreement would lead to insolvency and in the event of insolvency the company would be unable to serve the public. The only way that the company could continue to serve the public with street railway facilities was to refuse to continue service under these franchise grants, that is, to do just what it in fact did on August 20, 1918, surrender and abandon them.

If the company undertook to retain the benefits of the franchises and to escape liability for its burdens, particularly the rate schedules, the city would be in a position to enforce the rates. The contracts would still continue in force and the company would be obligated to comply with their terms and conditions.

This was the case in *Interurban Railway & Terminal Co. vs. City of Cincinnati*, 93 Ohio St. 108, 112 N. E. 186. The railway company was operating under a franchise from a suburban municipality, which provided that, if that municipality should be annexed to Cincinnati, the rate of fare to the Cincinnati terminus should not exceed five cents. It was:

> "*Held.*—The acceptance of the grant by the company constituted a binding contract between the parties. As long as the company retains the franchise and operates its road thereunder its terms must control."

On appeal the railway company sought leave to amend its answer and alleged that this rate of fare was confiscatory, but the Court of Appeals refused leave to file the amended answer. It is hardly conceivable that this amendment would have assisted the railway company, for it did not undertake to surrender the franchise. On the contrary, it claimed the benefits of the franchise and refused to pay the price. At the end of the opinion the Court said (page 124):

> "The only thing the court can do is to enforce the contract as it finds it and to hold that as long as the company continues to operate under the franchise it must submit to the terms thereof."

There can be no escape from this conclusion.

This same Interurban Railway and Terminal Company thereafter filed its complaint with the Public Utilities Commission of Ohio asking that the Commission should enter into an investigation of its rates of fare then charged and praying for an increase. The Supreme Court of Ohio (*Interurban Railway & Terminal Company vs. Public Utilities Commission*, 98 Ohio State 447) held that the Commission had no jurisdiction to regulate such municipal fran-

chise rates. The first paragraph in the syllabus contains the following:

> "As long as the company retains the franchise and operates its road thereunder, its terms must control."

In *City of Columbus vs. Columbus Street Railway Company*, 45 Ohio, 98, the city enforced an obligation assumed by the company by acceptance of the franchise grant to pave a portion of the street. The following appears in the syllabus:

> "By constructing and operating its railway the company accepted the burdens with the privileges of the ordinance and thereby incurred the continued obligation to make, construct and keep in order and repair, *as long as it enjoyed these privileges*, the portion of the street between the rails of its track, including such new improvement thereof as the city might determine and direct."

The Italics are ours.

To the same effect is *Cincinnati & Springfield Railway Co. vs. Incorporated Village of Carthage*, 36 Ohio, 631.

These cases go no further than to hold that while the franchise contract continues and the company retains its benefits the company is under an obligation to comply with its terms and conditions. There can be no doubt that this is a sound statement of the law, but it has no bearing upon the question whether a street railway company, by the acceptance of a permissive franchise grant, assumes any obligation to continue to operate thereunder. This question was given very careful consideration in the case of *San Antonio Street Railway Co. vs. State*, 90 Texas 520, 39 S. W. 926. This was a suit instituted by the State of Texas *ex rel*, to compel the Railway Company by mandamus to continue to operate a portion of its lines under a city ordinance granting a franchise for the life of the company's charter. The

lower court granted the relief prayed for, but the Supreme Court reversed the judgment. The first paragaph of the syllabus reads as follows:

> "Permission being granted an incorporated company, by ordinance of a city, to construct and operate a line of street railway, its acceptance, by constructing the line, of such mere permission to do so, does not impose upon it such an undertaking to continue to operate the entire line so built as the State can enforce by mandamus."

In the course of the opinion, GAINES, *C. J.*, said (page 526):

> "The legislature, in creating a corporation, had the power to give it an option to do or not to do the acts which it is authorized to perform. On the other hand, it may impose upon the corporation, as the law of its creation, the obligation to exercise to their fullest extent the powers which are granted. In either case, the proposed corporation may accept or not; and in the latter, if they do accept, they may be compelled by mandamus to perform the duties so imposed. But to say that in granting a charter to do a public service there is no difference between making it lawful to do an act and imposing it as an obligation to perform it, is to say that, by reason of the public interest involved, language is to have a different construction and effect from what it would have in statutes in general, or in private contracts. * * * When, therefore, a corporation, whether *quasi* public or purely private, is granted the privilege of doing an act, and there are in its charter no express terms which make it obligatory to do the act, or other words from which by fair construction that intention can be gleaned, we do not see upon what sound principle the duty can be imposed. * * * The franchise in question was granted by the city council, and the claim is that it is by virtue

of that concession, and its acceptance by the company that the duty arose. But the ordinance (which is quoted above) merely grants 'the privilege' of constructing and maintaining street railways over the lines therein designated. No clearer words of mere permission could have been employed. Not only this, but there is in the ordinance neither sentence, phrase, nor word that indicates that it was the intention of the council to make it a condition of the acceptance of its grant that the company should be bound to construct and operate railways over the streets which were therein specified. * * * It is clear that the ordinance in this case neither by express terms nor by implication imposes the duty upon the company. If the duty to construct and maintain the line is to be established, it must be upon the assumption that every privilege granted by a legislative body in reference to matter of public interest imposes upon the grantee who accepts it, the duty to perform the acts he is allowed to perform. The assumption, in our opinion, is, as we have already intimated, not based upon sound reason, and is in opposition at least to the weight of authority. * * * If it is the will of the Legislature, or of a municipal body to whom the power to confer the privilege may have been granted, to impose upon the corporation the duty to construct and to continue to operate the work, instead of a mere permission to do so, it is not difficult so to provide by incorporating into the grant some language which evinces that intention."

This case was cited and approved in *State vs. Helena Power & Light Co.*, 22 Mont. 391, 56 Pac. 685, which was a suit for mandamus against the Power and Light Company to compel it to operate a portion of its line of street railway in the city of Helena. The State contended that the acceptance of the city franchise grants imposed an obligation up-

on the company to continue to operate thereunder and that that obligation could be enforced by mandamus. The Court said (page 394):

> "The ordinances of the city are barren of language expressing or implying the intention of the council to impose such duty. On the contrary, they merely grant the right and privilege of constructing, operating and maintaining railways in particular streets."

The San Antonio Street Railway case, *supra*, was then cited, a long quotation was copied from it, and the petition for mandamus was refused.

In *Savannah Canal Company vs. Shuman*, 91 Ga. 400, the Court discussed a similar franchise grant and used the following language (p. 402):

> "So long as the corporation retains its franchise it will not be allowed to urge as an excuse for failing to perform any duty required of it by its charter that the same would be unprofitable. * * * If the rights, privileges and franchises granted by the charter are, in connection with the corresponding duties thereby imposed, no longer desirable, the company should simply surrender the charter."

In *Fellowes vs. Los Angeles*, 151 Cal. 52, the question presented was whether a water company could be forced to continue to supply water. The Court said (page 64):

> "We do not mean to say that a corporation engaged in the distribution of water to public uses may not abandon its property and quit the business without being subject to mandatory proceedings to compel it to carry it on. It may find it impossible to go on. Its supply may become exhausted or be insufficient for paramount needs, and the rates fixed by law may

be too small to enable it to operate at a profit or without substantial loss; or it may conclude without reason which the law would consider sufficient that it will not continue."

In *York & N. M .R. Co. vs. Reg.*, 1 El. and Bl. 858, the suit was mandamus to compel the railway company to complete its line. The Court held that the suit could not be maintained, saying (page 865):

> "It seems to us therefore that these statutes do not cast upon the plaintiffs in error this duty, either by express words or by implication; that we ought to adhere to the plain meaning of the words used by the legislature which are permissive only; and that there is no reason in policy or otherwise why we should endeavor to pervert them from their natural meaning."

This case is cited with approval in *Northern Pacific R. Co. vs. Territory of Washington*, 142 U. S. 492, where this Court said:

> "But if the charter of a railroad corporation simply authorizes the corporation without requiring it to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by mandamus to complete or maintain its road to that point when it would not be remunerative. *York & N. M. R. Co. vs. Reg.*, 1 El. & Bl., 858; *Grand Western R. Co. vs. Reg.*, 1 El. & Bl., 875; *Commonwealth vs. Fitchburg R. Co.*, 12 Gray, 180; *State vs. So. Minnesota R. Co.*, 18 Minn. 40."

The difference between a duty imposed and a privilege granted is recognized in *Sherwood vs. A. & D. Ry. Co.*, 94 Va. 291; 26 S. E. 293.

These authorities sustain the proposition that a street railway company operating under a permissive charter and permissive municipal franchise grants may discontinue its

street railway operations and cannot be forced to continue them by mandamus or injunction.

In *Northern Pacific R. Co vs. Territory of Washington, supra*, a condition is suggested to the right of the company to surrender a permissive grant, that is, the right is admitted if performance would be unremunerative. If any such condition is necessary, it certainly exists in the present cases for the bill charges that the rates are confiscatory and this charge is admitted by the motion to dismiss.

For failure on the part of the company to comply with any of the terms and provisions of the franchise grants, the rights, powers, privileges and franchises thereby conferred may be forfeited by *quo warranto*. This is the natural remedy reserved to the public for any such failure on the part of the company. An attempt to enforce the terms and provisions prescribed in the franchise grants by mandamus or injunction presents a very different question. In the present case, the basis of the city's position is an alleged contract obligation. The further continuance of the contract, that is, the further exercise by the company of the rights and franchises granted, being subject to the will of the company as the grants were permissive only, and the rights and franchises as well as the contract itself having been terminated by the Company by its surrender and abandonment, the contract right upon which the appellees rely no longer exists.

The fact that the franchises are permissive only does not make them any the less legislative enactments, nor any the less contracts, limited and terminable as herein stated. So long as the franchises are retained, the contractual rights and liabilities continue, but when the contracts are terminated, all such rights and liabilities are terminated also.

We are not unmindful of the principle that a duty is supposed to be imposed upon a public utility, such as a railroad company and perhaps also a street railway company, to continue to serve the public. The franchises and privileges are conferred upon the public servant for the

primary purpose of serving the public, rather than to yield profit to the company.

In *Northern P. R. Co. vs. North Dakota ex rel, McCue,* 236 U. S. 588, 59 L. E. 735, the Court said, in speaking of the railroad company in that case (p. 595):

> "The general principles to be applied are not open to controversy. The railroad property is private property devoted to a public use. As a corporation, the owner is subject to the obligations of its charter. As the holder of special franchises, it is subject to the conditions upon which they were granted. Aside from specific requirements of this sort, the common carrier must discharge the obligations which inhere in the nature of its business. It must supply facilities that are reasonably adequate; it must carry upon reasonable terms; and it must serve without unjust discrimination. These duties are properly called public duties, and the state, within the limits of its jurisdiction, may enforce them. The state may prescribe rules to insure fair remuneration and to prevent extortion, to secure substantial equality of treatment in like cases, and to promote safety, good order, and convenience.
>
> "But, broad as is the power of regulation, the state does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. * * * The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection, and seek to impose upon the carrier and its property burdens that are not incident to its engagement."

In *Norfolk & Western R. Co. vs. Conley*, 236 U. S. 605, 59 L. E. 746, the Court said (p. 608), in speaking of the power of the public authorities over railroad companies, and referring to the case last above cited:

> "It was further held that despite this range of permissible action, the state has no arbitrary power over rates, that the devotion of the property of the carrier to public use is qualified by the condition of the carrier's undertaking that its services are to be performed for reasonable reward."

There is undoubtedly a duty resting upon the public to see that a public utility is allowed to charge compensatory rates. In the case mentioned above, *Interurban Railway & Terminal Company vs. City of Cincinnati*, 93 Ohio St. 108, the Court said (p. 123):

> "In fact it may be said that it is the duty of the municipal and other authorities to provide sufficient compensation."

In *City and County of Denver vs. Denver Union Water Company*, 246 U. S. 178; 62 L. Ed. 305, Mr. Justice PITNEY, delivering the opinion, said:

> "In this situation there can be no question of the company's right to adequate compensation for the use of its property employed, and necessarily employed, in the public service."

If any public authority undertakes to force a public utility to comply with any *quasi* duty resting upon it to serve the public, it must see that the compensation provided is adequate and compensatory, not confiscatory.

In the present cases, counsel for the appellees apparently rely not only upon the obligations of the contracts evidenced by the francise grants, but, in addition, they contend that the company has no right to cease its operations under these

franchise grants because of the alleged duty imposed by law, independent of any contract or agreement evidenced by the franchise grants, or implied from the acceptance of these grants, to continue to furnish street railway facilities to the people for the full term therein specified. Counsel for the city have referred to a number of authorities which discuss this *quasi* duty resting upon a public servant. A number of the cases are discussed by Judge WESTENHAVER in his opinion (Record No. 715, pp. 82, 83). These are cases in which the question decided was whether a railroad company may be compelled by injunction or mandamus to continue to serve the public. In these cases the railroad company had abandoned, or was about to abandon, the operation of its line, or a part of its line on the ground that further operations would result in loss. The question presented in these cases is not one of rates, but inability to operate at a profit irrespective of any rates that the company might charge. The present cases present a very different situation. The Columbus Company has not abandoned and has not threatened to abandon any part of its street railway lines. It charges that it cannot operate these lines without loss, if the rate schedules prescribed in the franchise grants are complied with. It denies it is obligated to continue to limit its charges to these rate schedules. It claims that the franchise grants are permissive only and that they have been surrendered and abandoned. It is quite willing to furnish street railway facilities to the public. It is in fact doing so at the present time and has never ceased operating its street railway lines, nor has it any intention to cease such operations, unless it is limited to the charges set forth in the franchise rate schedules. If these rate schedules are enforced against it, the company will have no choice. Insolvency will surely result and make it impossible for the company to continue. Its purpose in surrendering and abandoning the franchise grants was solely to escape any obligation to continue the rate schedules therein prescribed. It could not escape these obligations so long

as it retained these franchises. The issue is therefore narrowed to a question of rates and on this question the position of the appellants on this branch of the case is that the rate schedules no longer exist since the franchise grants have been surrendered and abandoned. So long as the company is allowed to continue to operate its street railway cars upon the streets of the city, no objection can be made to the new rates on the ground that they are unreasonable. The city has the privilege of ousting the company from the streets, excepting only those on which it has perpetual franchises, for the situation is the same as it would be if the franchise grants had expired by lapse of time, or had been forfeited by appropriate action of the city authorities.

If the company is mistaken in regard to its right to surrender and abandon these franchise grants, it is relegated to its other propositions which are discussed at a later point in this brief, that is, the effect of the war emergency and of the 14th Amendment upon the rights of the parties. On the supposition that the franchise grants are still in force, certain cases of the class referred to by Judge WESTENHAVER in his opinion (Record No. 715, pp. 82, 83) may become important because they discuss the question whether a railroad company can be required to continue to serve the public when this cannot be done without loss. These cases will be referred to later when we discuss the force and effect of the 14th Amendment.

There is another class of cases in which efforts have been made by the public authorities to f rce railroad companies or other public utilities to continue their operations, when the result of such operations would be a loss to the company and these efforts have been unavailing, although the decisions have not been based upon the fact that the grants of rights have been permissive or because the public utility was protected by the 14th Amendment, but rather upon the basis that it was practically impossible to make the company perform. The following are certain Ohio cases of this class:

In *State ex rel. vs. The Black Diamond Co.*, 97 Ohio St. 11, JOHNSON, *J.*, said (p. 17):

> "We know of no way to compel the owner of a line of railroad, which in its proper operation does not produce sufficient revenue to afford proper compensation, to continue its operation. We think it obvious that there could be no such compulsion. Such a situation has been considered in many cases."

In *Henry vs. P. C. & St. L. Railway Co.*, 2 Ohio N. P. 118, the Court in considering whether a railroad company could be forced to operate, uses the following language (p. 143):

> "I think equity will grant specific relief under a contract when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice; but that it will withhold such relief when it appears that, from circumstances connected with its inception, the enforcement of the contract would be unreasonably harsh and oppressive, or when it appears that the contract was fair and just when made, but from subsequent events its enforcement would be unreasonably harsh and oppressive."

This last sentence is very pertinent to the present cases for the rate schedules provided in the franchise grants were fair and just when made but subsequent events have made them unreasonably harsh and oppressive.

In *Mathews, City Solicitor vs. Southern Ohio Traction Co.*, 5 Ohio C. C. (N. S.) 179, suit was brought to compel the Traction Company to perform certain obligations assumed by its predecessors in certain franchise grants. The syllabus reads:

> 1. "A decree of specific performance will not be granted by a court of equity, where, in order to make the performance effective, continuous supervision

will be required over personal acts of faith and diligence, and an exercise of judgment in meeting and adjusting relations to new conditions as they arise.

2. "It follows, therefore, the specific performance is not the proper remedy to compel an interurban railway company, which is operating an electric road under a municipal grant, to announce names of street crossings, to keep tickets for sale on its cars, to limit the speed of its cars, or to run cars as often as public convenience and the business of the road will justify."

In *Coe vs. C. P. & I. R. Co.*, 10 Ohio St. 372, the Court used the following language (p. 381):

"If we are at liberty to suggest, on what the legislature very probably relied for the continued operation of the railroad once constructed, we should say it was the interest of its owners. If it can be operated profitably, the interest of those concerned will rarely, if ever, fail to keep it in operation, so as to subserve the public use. If it cannot, we know of no mode by which the state can compel those by whom it was constructed to operate it at a loss; and certainly there is no mode provided by which it can be operated at the expense and risk of the state, the prudence of such a course could find few or no advocates."

In *Port Clinton R. R. Co. vs. Cleveland & Toledo R. R. Co.*, 13 Ohio St. 544, suit was brought to enforce operation of a railroad under a lease. The Court refused specific performance, saying (p. 556):

"Even if the contract was sufficiently specific, so that the party, when ordered to operate the railroad, would know the manner and mode in which the order was to be obeyed, still the question of obedience to the order must necessarily be left open. And the question of obedience to such an order might come up for solu-

tion, not once * * * but in instances innumerable, and for an indefinite time."

In *Maryland Telephone & Telegraph Co. vs. Charles Simons' Sons Co.*, 103 Md. 136, the Telephone Company was operating in the City of Baltimore under an ordinance granting it permission to construct and operate its telephone lines in consideration for furnishing service at the rates prescribed therein. Those rates furnished adequate compensation for the number of patrons originally served, about five hundred, and for the kind of service then furnished by what was known as the "trunking system;" but when the number of patrons increased to seventy-five hundred, which greatly increased the cost of serving each patron, and, after the development of the art had made it necessary to adopt and use a much more extensive system known as the "central energy system," the company increased its rates about 50 per cent. in order to meet the increased cost of installation and service. Thereupon certain of its patrons, claiming the right to continued service at the ordinance rates, brought suit to enjoin the company from refusing to serve at those rates. The court decided against the plaintiffs below. In his discussion of the disastrous consequences which would result from granting the relief sought, PAGE, *J.*, in the opinion (pp. 144, 145), used the following very interesting language:

> "This would mean only one thing, and that is that the appellant could not find it possible to continue the service, but would speedily pass into the hands of receivers. The counsel for the appellees, while not resisting this conclusion, attempts to meet it by arguing that the service could still be supplied by deducting the alleged deficiency from the interest on the bonds * * * All of the proceeds thereof, referring to bonds, besides other large sums, were devoted exclusively to that purpose, and the expenditure was rendered necessary to furnish the equipment necessary to meet the

demand of the public. The bonds were put on the market and sold to purchasers * * *. So that the proposition asked for by the complainants is that the court shall issue its injunction restraining the appellant from charging more than the rates provided for by its contract as expressed in the ordinance, by which great losses will be incurred by many innocent persons, and the public will be deprived of the benefits of competition in the business of furnishing telephone service, for the benefit of and on the application of eighteen persons. By granting this injunction, each of the appellees will be nominally benefited in small amount; but in fact the appellant may be forced into the hands of receivers, so that the service cannot be rendered at all, and the decree would eventually be of no service to them, while disaster would be brought on the corporation, and large and irreparable losses entailed upon the holders of the bonds, and thereby the very purposes for which the ordinance No. 110 was enacted probably entirely defeated. Under these circumstances, it is manifestly the duty of the court to deny the injunctions prayed for, and leave the appellees to such remedies as they may have at law."

This list of cases might be multiplied almost indefinitely. Although the present cases are not suits for specific performance or for mandamus, the rights of the parties are properly before this court and these cases are important in considering what these rights are. It is inconceivable that the city could succeed in forcing the company to continue operating under the confiscatory rates in a suit for specific performance or in a mandamus proceeding.

## IV

## THE EFFECT OF THE WAR UPON THE OBLIGATIONS IMPOSED BY THE FRANCHISE GRANTS

In considering this branch of the case we assume for the purpose of the argument that the franchise grants imposed obligations upon the company to continue to operate its street railway lines during the balance of the twenty-five year term and charge only the rates of fare therein prescribed. Upon this assumption it does not at all follow that these obligations have continued until the present time or, in fact, were in force on August 20, 1918, when the company surrendered and canceled the grants. The war intervened and created a situation which was not within the contemplation of the parties when the grants issued and were accepted. The war has created a situation which has proved quite distressing to the street railway companies throughout the country, excepting only where relief has been granted by the local authorities. All operating expenses have advanced by leaps and bounds with the result that former rate schedules soon became unjust, unreasonable and confiscatory. This fact has been recognized in a great many localities and certain local authorities have acceded to requests presented by street railway companies to allow them to increase their rates. Although the City Council of the City of Columbus has been requested to allow the Columbus Company to increase its rates and negotiations have continued ever since last February to secure some relief for the company from the confiscatory rates prescribed in the franchise grants, no relief has as yet been given. It was because of this failure to secure any relief that the company undertook to surrender and abandon its franchises on August 20, 1918. Although relief has been granted to street railway companies at many points, such action does not, of course, evidence any legal right on the part of the railway company to demand such relief, but only evidences

a recognition of the substantial justice of the requests presented by the companies. The basis for the claim of the appellants in these cases that the company is no longer obligated to continue charging the rates prescribed in the two franchise grants, assuming that the grants impose such obligation, is that the situation presented by the war was not within the expectation or contemplation of the parties when the contracts were made, and that as this situation has been created by the war, which is a *vis major*, the company is justified in claiming that the contracts were not intended to be binding in any such event.

The leading case on this subject in the United States is *North German Lloyd Company vs. Guaranty Trust Company*, 244 U. S. 12, sometimes referred to as the Kronprinzessin Cecilie case. The Guaranty Trust Company shipped a large amount of gold from New York to Plymouth, England, on the Kronprinzessin Cecilie just before the war broke out, under a contract of carriage with the North Germany Lloyd Company, the owner of the ship. When the ship reached a point in the Atlantic Ocean about one thousand miles from Plymouth, the master was advised by wireless from the owners of the vessel, wiring from Germany, that war had been declared against Russia, France and England and was directed to return to the United States. He turned his vessel around and brought it to Bar Harbor, Maine, and failed to deliver the gold to the consignee. The Trust Company sued for damages for breach of contract. The defendant claimed that it was justified in the course it took and could not be required to respond in damages. This court sustained this defence. Performance was not made impossible by the breaking out of war, for on this point the Trust Company showed that the information received by the master by wireless was not correct and that if he had continued his voyage the contract could have been performed, as the voyage would have ended before war was declared. This Court said (p. 24):

> "Business contracts must be construed with business sense as they naturally would be understood by intelligent men of affairs."

The master, in mid-ocean, was presented with a situation which called for the exercise of business judgment, discretion and intelligence. He acted as an intelligent man of affairs should act under such circumstances. This Court said (p. 22):

> "The seeming absolute confinement to the words of an express contract indicated by the older cases like *Paradine vs. Jane*, Aleyn 26, 82 Eng. Reprint 897, has been mitigated so far as to exclude from the risks of contracts for conduct (other than the transfer of fungibles like money), some, at least, which if they had been dealt with, it cannot be believed that the contractee would have demanded or the contractor would have assumed."

It cannot be believed that the North German Lloyd Company would have assumed the risk of landing the gold at Plymouth for the compensation provided in the contract if that company had believed that war would be declared before the vessel reached that port. Nor can it be believed that the Guaranty Trust Company would have demanded such services from the North German Lloyd Company. The situation presented to the master of the vessel was not within the contemplation of the contracting parties when the contract was made, and in that situation, properly handled by the Master, no obligation could arise out of the contract for failure to perform.

The latest English case on this subject is *Metropolitan Water Board vs. Dick, Kerr and Co.*, 1918, Appeal Cases 119 (House of Lords, November 26, 1917). The parties had entered into a contract for the construction of extensive water works, which would require a period of from four to six years to complete. The work was started in

August, 1914, immediately after war was declared and continued until February, 1916, when the Director of Factory Construction in the Ministry of Munitions commandeered a part of the plant used by the contractor, and further progress of the work at that time became impossible. The Water Board instituted suit in May, 1916, claiming that the contract was still binding on the parties, although work was necessarily suspended until after the war. The issue presented was whether the contract should be considered as suspended only or as abrogated. The Court held that it was abrogated, reversing the decision of the lower court, which held that it was suspended only. In the lower court, BRAY, *J.*, held that the delay resulting from the action of the Director of Factory Construction was not so great as to render the completion of the contract physically impossible or commercially impracticable. In the House of Lords, Lord FINLAY said (pp. 125, 126):

> "This is not a case of a short and temporary stoppage, but of a prohibition in consequence of war, which has already been in force for the greater part of two years, and will, according to all appearances, last as long as the war itself."

And again (pp. 126,127):

> "The contract in the present case was for the completion and handing over of these works within six years from August 16, 1914. The effect of the prohibition may be that the works cannot be resumed until, at all events, the greater part of the six years has expired, and by that time all conditions as regards labor and materials may be absolutely different. This, in the words of ROWLATT, J., would be 'not to maintain the original contract, but to substitute a different contract for it.'"

Lord DUNEDIN said (p. 130):

> "On the whole matter I think that the action of the Government, which is forced on the contractor as a *vis major*, has by its consequences made the contract, if resumed, a work under different conditions from those of the work when interrupted. I have already pointed out the effect as to the plant, and, the contract being a measure and value contract, the whole range of prices might be different. It would in my judgment amount, if resumed, to a new contract; and as the respondents are only bound to carry out the old contract and cannot do so owing to supervenient legislation, they are entitled to succeed in their defence to this action."

Lord PARMOOR said (p. 130):

> "The question is one of contract law, and the decision in each case depends on the ascertainment of the true meaning of the bargain between the parties. If the parties have provided by apt words in the contract for their mutual rights or liabilities, in the event of the contract works being stopped, or indefinitely hindered by the operation of a subsequent law and such provision is not contrary to public policy, then it would be the duty of any Court to give effect to such provision. If, on the other hand, the contract contains no provision for such a contingency as the interference of the Legislature, then the Court must determine whether this contingency is of such a character that it can reasonably be implied to have been in the contemplation of the parties at the date when the contract was made."

And again (pp. 138-139):

> "What is the real meaning and purport of such a contract? It is that works shall be carried out at

prices fixed with reference to the then outlook for cost of labor, plant, and material, spread over a defined limit of time, which could not fail to affect materially the figures inserted by any contractor in sending in his tender. The same considerations would affect the appellants in coming to a determination whether a tender should or should not be accepted. During the execution of such a contract a contingency arises by the intervention of the Legislature, or of a department authorized by the Legislature, which renders the further continuance of the execution of the works illegal for a substantial and indefinite time, and which causes the removal of a large portion of the plant employed to Government works or for Government purposes. I use the word 'indefinite' since there is no certainty of the time of the duration of the war of which judicial cognizance can be taken. Can it be said that a risk of this kind was in the contemplation of either party at the date of the contracts? The necessary implication appears to me to be that it is a risk which no contractor would contemplate to be a risk under his contract, and which no public body controlling public funds could have regarded as a possibility affecting their liability in the absence of express provision. It is not necessary to say that the works are not physically possible, or could not practically be carried out as a business adventure, at a subsequent date. I agree that the probability of hardship to one side or the other is not a matter of material consideration, but it is quite a different matter when there is an indefinite and indeterminate liability which might impose on either party an unforeseen burden totally foreign to the ordinary incidents in a contract of this character, or which might not improbably eventuate in a loss to both parties without any compensating advantage. In my opinion the original contracts have ceased to be operative."

And again, pp. 140-141, after stating that a contracting party may bind himself against any contingency by appropriate words, Lord PARMOOR quoted with approval from the opinion of HANNEN in the case of *Baily vs. DeCrespigny,* 4 L. R., Q. B., 485, as follows:

> "But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

This Water Board case was considered by Judge WESTENHAVER, who said (Record, No. 715, p. 84):

> "In Metropolitan Water Board vs. Dick, Kerr & Company a contractor had agreed to construct a part of a water system within six years, and after beginning work thereon his equipment and the site upon which he was to do the construction work was seized by the military authorities of Great Britain for war purposes. Obviously here was a *vis major* rendering impossible the further performance of the contract into which the parties had entered. It was impossible to proceed further."

Judge HOLLISTER, in speaking of this Metropolitan Water Board case, said (Record No. 739, p. 59):

> "The English Government commandeered the plant of the contractor to build water works, making it impossible for him to proceed with his contract."

Both of these judges apparently thought that performance by the contractor was excused, because performance had become impossible, owing to the fact that the contractor's plant, or a part of it, had been commandeered by the

authorities. This is not the point decided in this Metropolitan Water Board case. Both parties in that case admitted that performance had become impossible by action of the authorities, until after the war was over. The Water Board contended that the contractor was still liable under the contract to perform at the end of the war. The contractor contended that at the end of the war the situation would be so different in regard to performance of any contract of this kind, that he should be relieved from all liability to perform. The court took this view. The case is direct authority in support of the appellants' contention in the present two cases, because it sustains the view that a situation, which was not within the contemplation of the parties at the time the contract was entered into and which was brought about by the war, is not within the scope of the contract and no liability arises for failure to perform. The only difference between the Water Board case and the instant cases is that in the Water Board case the question was whether the contractor should be held liable to perform his contract at the end of the war, whereas in the instant cases the question is whether the Railway Company is obliged to perform its contract at the present time. In both cases the unexpected situation was brought about by the war and, of course, in both cases the situation that has developed could not have been within the contemplation of the parties at the time the contract was made.

In *Liston vs. Owners of Steamship Carpathian* (1915) 2 K. B. (E. & J.) 42; 84 L. J. K. B. 1135; 112 L. T. N. S. 994, seamen shipped for a voyage for specified wages, but upon arrival at an intermediate port found that war had broken out and on that account that the risks of the voyage had very materially increased. They refused to proceed, but upon being promised higher wages agreed to continue the voyage. When the voyage was over, the master refused to pay the extra wages. The seamen sued and in the opinion of Lord COLERIDGE said p. 47:

"It is quite clear that seamen who enter into a contract of service as seamen cannot, because they do not like the conditions of their service, or there happens to be a storm, or because, under certain circumstances they are asked to do a little more or heavier work in consequence of illness of the crew, or for some other reason of a similar nature, demand to be released from that contract; for that is the result if they are entitled to require increased remuneration. They undertake by their contract to give their whole time, and they also undertake certain risks of navigation which are well known to all of them; and all those risks are in contemplation between the parties when the wages are fixed. But it is quite clear that it was not in the contemplation of the parties when they made this bargain that war would be declared between the country of the ship and another power, both being maritime powers and both having vessels of war which might or might not overrun the very portion of the sea through which this vessel was to pass. * * * *Prima facie* a war risk is not necessarily a risk to life. A risk to life has in certain circumstances, which it is not necessary to enter into, been held to be a ground for the discharge of the contract. But that is not the guiding point of my judgment in this case. The test is whether there were war risks which in the reasonable contemplation of the parties might involve capture at sea. In embarking on a vessel upon a commercial voyage one does not include among the risks of the voyage capture by an enemy. What were the risks which reasonably a seaman might contemplate in the present case?"

The court then considered the ordinary risks and held that these war risks were extraordinary risks not within the contemplation of the parties when the contract was made and concluded as follows:

"In these circumstances I am of opinion that the crew were justified in remaining on shore at Texas and refusing to proceed on the voyage and that being so that they were discharged from their obligation to sail."

In the case of *Tamplin Steamship Co. vs. Anglo-Mexican Petroleum Products Co.*, Appeal Cases, 1916, Vol. 2, p. 397, where a similar question was presented, LORD HALDANE said (p. 407):

"The question must always turn mainly on the facts. But if the facts be such that it appears that the power of performance has been wholly swept away to such an extent that there is no longer in view a definite prospect of this power being restored, then the contract must be looked upon as being wholly dissolved, and the courts cannot take any course which would in reality impose new and different terms on the parties."

In *Brenner vs. Consumers Metal Co.*, 41 Ont. L. R. 534 (1917-1918) plaintiff sought to recover damages for the non-delivery of five carloads of shrapnel turnings according to contract. The defendant argued that it had made an honest effort to comply with the contract but failed because of lack of shipping facilities. The Court approved the ruling of the trial judge in the following language (p. 538):

"That it was an implied term of the contract that unless the necessary shipping facilities should be available within a reasonable time the obligation of the company to deliver should be at an end."

In *Krell vs. Henry* (1903) 2 K. B. 740, suit was brought for the rent of a flat which was hired for the coronation parade at the coronation of King Edward VII. The celebration was postponed and the defendant denied liability on the ground that he had hired the flat to see the

parade and there was no parade. WILLIAMS, *L. J.*, delivering the opinion said (p. 749):

> "I do not think that the principle of the civil law, as introduced into the English law is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of something which is the subject matter of the contract or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences drawn from surrounding circumstances recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things."

The court sustained this defence on the theory that the defendant never intended to pay for the flat unless he and his party could see the parade.

In *Chicago M. & St. P. Railway Co. vs. Hoyt*, 149 U. S. 1, the defendant railway company had leased to the plaintiffs a plat of ground to be used, with other ground owned by them, for grain elevator purposes and the contract sued upon contained a covenant on the part of the railway company that the amount of grain *received* at the elevator should be at least 5,000,000 bushels on an average for each year for the term of the lease. It developed that certain parties using the facilities of the grain elevator allowed their grain to remain there, so that the elevator company could not handle the 5,000,000 bushels for which the contract provided. The result was a loss to the elevator company and it sued the railroad company for damages. The opinion in that case said that a party may contract by an unqualified undertaking to bind himself to anything which

subsequently becomes impossible, or to pay damages for non-performance and then the following language from the opinion in *Baily vs. DeCrespigny*, 4 L. R., Q. B. 485, and which also appears in the last quotation above from the Metropolitan Water Board case was used in the opinion (p. 15):

> "But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

The result was that the contract of the parties was given such an interpretation that the railway company was not held bound by it in the unexpected situation which had developed.

In *The Steamship Styria vs. Morgan*, 186 U. S. 1, the Master of the steamship Styria unloaded in Sicily some sulphur that had been shipped from Trieste to New York, because war had been declared and sulphur was contraband of war. The Court held that the master had exercised reasonable discretion in pursuing this course, and that the owner of the ship was not liable in an action for damages.

In *B. E. & C. R. Co. vs. N. Y., L. E. & W. Co.*, 123 N. Y. 316, the defendant railroad company had guaranteed the bonds of another railroad company which subsequently became insolvent and went into the hands of a receiver. The bondholders undertook to enforce the guarantee. The railway company, guarantor, defended on the ground that a situation had developed which was not within the contemplation of the parties when the guaranty was given and that on that account the guaranty could not be enforced. PECKHAM, *J.*, said (p. 328):

> "This is a condition of things not contemplated by either party at the time of the execution of the con-

tract. It is claimed that the insolvency of the plaintiff company was one of the facts which the contract provided for as the plaintiff company would be insolvent if it could not earn enough to pay its operating expenses and the interest mentioned, and that it was in just such case that the contract provided for an advance by the defendant to the plaintiff company."

And, again, on the same page, he said:

"The obligation to continue to pay the interest on the bonds of a company which could not earn enough to pay its own operating expenses is one which we cannot, in the light of the proved facts in this case, credit the plaintiff company with obtaining or charge the defendant with assuming. The consideration which the defendant would obtain by reason thereof is grossly insufficient to predicate the voluntary assumption by it of any such obligation. I think it may be properly assumed that the obligation to advance was founded upon belief that in the future it might be that the plaintiff company as with others owing to temporary embarrassments or the working of unforeseen though temporary causes, a contingency might arise by which a particular payment of interest could not be made because of an insufficiency of net earnings from which to pay it, and, in that event, the defendant was to advance enough to make up such deficiency, and this advance was to be secured by the pledge of future net earnings. It was clearly contemplated and supposed that there would be such earnings, although their existence was not a condition precedent to the right to claim repayment for such advances."

In *Moore & Tierney, Inc. vs. Roxport Knitting Co.*, 250 Fed. 278, the defendant company was unable to perform its contract with plaintiff to manufacture and deliver certain goods because the Advisory Board of National Defense

had called upon it to manufacture goods for war purposes. Plaintiff sued for damages for breach of contract but the Court held that:

> "It is the duty of a manufacturer where the United States orders war supplies to comply with the order though that prevents him from carrying out earlier contracts with private persons."

Such a situation was not within the contemplation of the parties to the contract.

Judges WESTENHAVER and HOLLISTER do not read these cases as we do. Judge WESTENHAVER (Record No. 715, p. 84) comments very briefly upon a number of them and then says (p. 84):

> "No such conditions are here present. The performance of these franchise contracts has not been made illegal nor rendered impossible by any superior power. War conditions, it is true, have made the performance of them only more burdensome and expensive, so far as the facts now presented tend to show. The war has in a different degree perhaps affected the performance of many, if not the larger part, of outstanding and unexecuted contracts between citizens of the United States, yet it would be a strong proposition to say that all such contracts are thereby rendered void or voidable at the option of the losing party.
>
> "The increased cost to complainant of performing its franchise contracts differs only in degree and quality from that due to other economic causes prevailing since they were made. If the war or economic changes had decreased the price of coal, materials, supplies and labor, it would not be urged upon anyone that the city would have the right to declare null and void these contracts or the fare provisions therein, and establish a new rate in accordance with new conditions; and if the city should take such a position it would be

met, and justly, with a complaint that such action is impairing the obligation of a valid and binding contract.

"In order to make applicable the principles of law urged in this connection, it would be necessary to show that war or military authority had directly interfered in such a manner as to make these contracts illegal or impossible of performance. Nothing less than the equivalent of actual seizure by military authority, or a direct and forcible intervention to prevent further performance, would bring the case within the operation of these rules."

Judge HOLLISTER comments more fully upon these cases (Record No. 739, pp. 55-59). On page 55, after stating that at the conclusion of the argument he had some doubt about whether or not this defence was not a valid one, he says:

> "That doubt lingers still. It must be conceded by defendants that when the contracts were made, the parties could not have had in mind the possibility that years thereafter such a catastrophe as this war would have befallen the world, and that the extraordinary rise in the cost of living, resulting therefrom, would have required an advance in the cost of labor so great as, if operation under the franchises were continued at the contract rate, to bankrupt the company; or that what was in effect a governmental compulsory war board of arbitration would fix a confiscatory wage for labor."

And again (p. 56), after stating plaintiff's argument, he says:

> "This argument carries counsel further than the circumstances of this case require, and if sound, would lead to the conclusion that any abnormal labor conditions of such a character as to bring about the bank-

ruptcy of the contractor by rendering compliance impossible would excuse him from performance and bring his contract to an end. This cannot be. A frequent illustration of abnormality in labor conditions is strikes, and their often disastrous financial consequences to the employer of labor. No one would now say that strikes and their results, however serious the financial consequences, bring to an end the contractor's obligation to perform his contract requiring the employment of labor. For still less cause could one affirm that if, upon adjustment of the controversy, the contractor agrees on a wage so high that it would bankrupt him within a short time, he could terminate his contract."

And again (p. 57), after speaking of the Seamen's case, which is the Steampship Carpathian case referred to above:

"If there is any analogy presented by the Seamen's Case, it lies in the fact that in that case the danger of capture during the voyage was not in the minds of the ship-owner or the seamen when the shipping articles were agreed to; while in this case the certainty of bankruptcy growing out of conditions affecting wages brought about by the same war, could not have been contemplated by either party."

This is a fair statement of plaintiff's contention. He continues:

"Logically, if the Seamen's Case is applicable to this, and should be adopted as the law of such a case as this (it was decided in February, 1915), the way would be open for the destruction of innumerable contracts to carry out which the employment of labor is necessary and which the parties expected, and agreed, to carry out, whatever the condition of the labor market might be during performance. In my judgment, the Seamen's Case does not apply to this (it is

> regrettable that the opinion of the court does not discuss the question involved in it from the standpoint of principle or previous decisions)."

And again (p. 59):

> "This is a different case. Here the government did not interfere directly with the contract, or appropriate in any way the complainants' plant to any of the government's purposes. The *vis major* apparent in those causes is wholly lacking here."

The present cases cannot be distinguished from the cases cited above simply on the ground that performance of the contract has become only more burdensome and expensive and that the war has affected the performance of many contracts, and that the increased cost differs only in degree from that due to other economic causes. Nor can these cases be distinguished from those cited above on the ground that increased costs are often due to strikes, as suggested by Judge HOLLISTER. Nor is it fair to say, as he does, that "the *vis major* is wholly lacking here." The difficulty in which the street railway company finds itself is directly due to the war and the war is properly designated a *vis major*.

It is not necessary to establish a *vis major* in order to bring the case within this class; for example, there was nothing of that kind in the case of *Krell vs. Henry, supra*, which was the Coronation Parade case, nor in the case of *Chicago, M. & St. P. Railway Company vs. Hoyt, supra*, which was the grain elevator case. Any case where a situation has developed which could not have been within the contemplation of the parties when the contract was entered into may be brought within the class if the necessary elements are present. In all of the cases of this class where a contracting party claims that the obligations of the contract do not apply because of the unexpected situation that has been presented, it must be shown that the situation is caused either by a *vis major* or by

something which was not and could not, in the ordinary course, have been contemplated and which has made a radical difference in the performance of the contract. Judge WESTENHAVER said (Record No. 715, p. 87):

> "It is undoubtedly true that the present situation is due to the rapid and unexpected evolution of uncontrollable events."

Judge HOLLISTER says in the first quotation above from his opinion that the parties could not have had in mind the possibility of any such catastrophe as this world war. Of course the war was not contemplated by the contracting parties. The present cases are therefore up to this point within the principle announced in the cases cited above. There is, however, another feature which must also be present in order that any particular case may be brought within this class of cases. The party claiming that the obligations of the contract do not apply in the unexpected contingency that has arisen, must show that the unexpected contingency has made a material difference in the performance of the contract and the difference must be such that no reasonable man, or any business man of intelligence, prudence and good judgment would have made such a contract if such a contingency had been contemplated. This point was carefully considered in the Kronprinzessin Cecilie case, and this Court held that it could not be believed that the contractee would have demanded or the contractor would have assumed the risks involved in the unexpected contingency that was presented, and that in that unexpected contingency the master of the ship had acted with intelligence and good judgment. The same point was considered in the Seamen's case and the Court held that the added risks of the voyage due to the war could not have been within the contemplation of the parties and that the seamen would not have shipped for the voyage at the stipulated wages, if these risks had been contemplated. On the other hand, if the balance of the voyage was to take place on seas where

there would be no chance of a German raider appearing, the seamen would not have been justified in refusing to perform their contracts. The same point was considered in the Styria case and this Court held that the sulphur would not have been received for transportation if the parties had contemplated that war would break out before the voyage was completed and, further, that the master had acted with intelligence and prudence in unloading the sulphur instead of transporting it to the consignee. In the Water Board case the Court held that, if the contractor was made to perform his contract after the termination of the war he would in fact be perfoming a different contract, as all of the conditions of performance would be different. This presents a very analogous situation to the situation presented in the present cases. If the railway company is required to perform the franchise contracts it will be forced to perform different contracts from these that its predecessors entered into by their acceptance of the franchise grants. The risks of performance are materially different from the risks contemplated, when these franchise grants were accepted. The same is not true where a contractor claims that he should not be forced to perform his contract because of strikes. A contingency resulting from strikes cannot be said to be outside of the contemplation of the contracting parties. Every contractor must necessarily contemplate that his employes may strike, particularly if he is required to employ a large number of men in order to perform his contract. The same is true if the suggested basis for relief is an economic change or economic changes. Such changes must be held to have been within the contemplation of the contracting parties when the contract was signed. The principles that must be applied in order to determine whether a particular case justifies relief are are reasonably clear, but, as is often the case, difficulties arise in applying these principles. In applying them to the present cases it must be recognized that the franchise contracts under existing conditions are different contracts from

the contracts which the parties intended to make, when the franchises were granted and were accepted. If the Columbus Company is, under existing conditions, required to perform these contracts, it will be required to perform different contracts from those which were originally made. This has resulted from no fault on the part of the Columbus Company. The cause is primarily traceable to the war, just as was true in the Kronprinzessin Cecilie case, the Water Board case, the Seamen's case, the Styria case, and a great many others. These cases recognize that war may have such a material and vital effect upon contract obligations that performance will not be enforced, if the party claiming relief can show that by reason of the war the contract which he or it is called upon to perform is a materially and vitally different contract from the one that was in the contemplation of the parties at the time the contract was signed. The present cases come within the class.

## V

## EFFECT OF THE FOURTEENTH AMENDMENT UPON THE RIGHTS OF THE PARTIES

If the franchise grants were in fact surrendered and ended, either because they were permissive in character or because of the war emergency, no issue is presented under the 14th Amendment, but the situation is the same as if the franchise grants had expired by lapse of time, or had been properly forfeited. A very similar case from Detroit involving the Detroit railway system was argued in this court on December 9, 1918, in which the Detroit Company undertook to set aside rates prescribed for the operation of its railway lines on streets where its franchises had expired. The difference between that Detroit case and the present cases is that the Detroit Company is undertaking to prevent the enforcement of a rate schedule, which it claims is confiscatory, on a portion of its lines, on which it admits that it has no franchises, whereas in the present cases

the appellants are endeavoring to prevent the enforcement of surrendered franchise grants with rate schedules which they claim are confiscatory. An analogous situation was presented in Toledo in the case of *Henry L. Doherty vs. The Toledo Railways & Light Company*, in the District Court of the United States for the Northern District of Ohio, Western Division, decided Aug. 2, 1918, where the railway franchises had expired. The District Court held that the city could not enforce rates prescribed by it which did not yield a fair return to the company. In the Detroit case the decision of the District Court was the other way. In the case of *Denver vs. Denver Water Company*, 246 U. S. 178, a very similar issue was decided by this court. These various cases do not quite reach the question involved in the present cases. They would be pertinent if the city of Columbus would accept the surrender and abandonment of the franchise grants and would then undertake to prescribe new rate schedules, against which the Columbus Company, if it thought them confiscatory, would be required either to claim the protection of the 14th Amendment against them, or to cease operating its lines. The Columbus Company has not as yet reached that situation. The issue presented in these cases, and particularly on this branch, is whether the appellees are authorized to enforce performance of the franchise grants, with their confiscatory rate schedules, and whether the company is not entitled to the protection of the 14th Amendment against such enforcement.

The rates prescribed in the two franchise grants are extremely low. The company cannot earn a fair return upon its investment if its charges are limited to these rates. If they were imposed upon the company by any city council, or commission or other body vested with authority to regulate rates and the company had theretofore been operating under a higher schedule, such prescribed rates would clearly be held confiscatory, and their enforcement would be enjoined as a violation of the 14th Amendment. The result would be the same if this hypothetical case were mod-

ified to the extent that the company, instead of claiming protection at once under the Fourteenth Amendment against these prescribed rates, operated under them for a period and then found that they were not producing sufficient revenue to yield a fair return upon the capital invested. This period of operation under such prescribed rates might be considered a period during which they were tested to see whether they were adequate and sufficient, or whether they were confiscatory, or it might be that, when originally prescribed they would be adequate but changed conditions, particularly increased operating expenses, might render them confiscatory. In either case the company could successfully claim the protection of the 14th Amendment.

There is no difference in principle between a rate confiscatory *ab initio* which has not been accepted and an accepted rate reasonable at the time, but which has become confiscatory and inadequate by reason of subsequent developments. A law may be constitutional when it is passed but, as the result of future developments, it may violate some constitutional limitation. This question was presented to the Supreme Court of Ohio in the case of *Castle vs. Mason*, 91 Ohio St. 296, 110 N. E. 464. The suit was instituted by a dealer in oils, gasoline, petroleum, etc., against the State officer whose duty it was to enforce a State inspection act requiring oils, gasoline, petroleum, etc., to be inspected, the purpose of the proceeding being to secure an injunction against the enforcement of the inspection act on the ground that it was unconstitutional. The basis for the relief claimed was that the fees prescribed by the inspection act had become, by reason of changed conditions, so large that they had no relation to the cost of inspection and on that account the act was not a proper exercise of the State's police power. The first point in the syllabus reads:

> "The constitutionality of a law may be determined by its operative effect though on its face it may be apparently valid."

The following appears in the opinion:

> "A law may be within the pale of constitutional authority when originally passed yet, because of its future operations, it may directly contravene the organic law."

A State legislature may enact a two-cents-a-mile law, which would be a reasonable rate regulation at the time it was enacted, but might become inadequate and on that account confiscatory by reason of subsequent developments. In that event any railroad company, otherwise subject to the provisions of the act, could claim protection under the 14th Amendment on the ground that the enforcement of the act would deprive it of its property without due process of law. If we apply these principles to the facts in the present cases, we may admit that the rate schedules in the franchise grants were reasonable and proper when these franchise ordinances were enacted and accepted, but the same rate schedules, by reason of subsequent developments, may become inadequate and confiscatory, which is in fact the case, and on that account the company should be entitled to the protection of the 14th Amendment against their enforcement.

This court has been called upon many times to consider whether prescribed rates were confiscatory. The principles of law involved are clear enough, but it is not always easy to apply them. The determination of the value of the investment presents many difficulties, also the amount of the earnings. Sometimes the company files its bill at once before the prescribed rates have been tested. In that event the court has to rely upon estimates. Sometimes the rates are tested for a period and in that event the court has actual figures from which to draw its conclusions. In *Norfolk & Western Railway Co. vs. Conley*, 236 U. S. 605, the Railway Company tested the rate, which was a rate of two cents a mile, fixed by act of the legislature of West Virginia, for a period of two years before filing its bill. The company established by its testimony that it could not earn a fair

return upon its passenger traffic by operating at this rate and on that account the court held that, so far as that company was concerned, the rate offended against the due process cause of the 14th Amendment. If the railroad company had waited for ten years and the proof had been the same, the result would have been the same.

The difference between the usual cases of this class and the present cases is that usually the rates objected to were prescribed in the exercise of the rate regulating power only, whereas in the present cases the rates represent terms or conditions in franchise grants. The two franchise grants are laws of the State, acting by ordinance of the city council, and the enforcement of the rates thereby prescribed will just as effectually deprive the company of its property without due process of law as in the class of cases mentioned. It is the result against which the 14th Amendment protects.

This result follows in the present cases none the less because the laws granted franchises which were accepted by the company; also none the less because the rates so prescribed are conditions of the grants. In the present cases the grantees accepted the grants subject to the condition that they would comply with the prescribed rates; but their successor does not undertake to retain the grants and at the same time, to repudiate the rate schedules. By the surrender and abandonment of the franchises the company places itself in a position where it can claim the protection of the 14th Amendment. Judge WESTENHAVER thought that this issue was settled against the contention of appellants by the conclusion that the grants were contracts. We believe that he considered them business or proprietary contracts rather than legislative enactments. If they were business or proprietary contracts the 14th Amendment would not apply, but it is clear that these grants are laws and not business or proprietary contracts, and, being laws, the 14th Amendment applies.

In *Interstate Consolidated Street Railway Co. vs. Commonwealth of Massachusetts*, 207 U. S. 79, which came to this court by writ of error to the Supreme Court of Massachusetts, a street railway company refused to comply with the requirements of a State statute, providing that school children should be carried at a reduced rate although that statute had been passed by the legislature before the street railway company was incorporated.

The syllabus reads as follows:

> "A street railway company whose charter subjects it to 'all the duties, liabilities and restrictions set forth in all general laws now or hereafter in force relating to street railway companies' is bound by the requirement of a statute previously enacted, that street railway companies shall transport school children at a reduced rate, although such statute may be unconstitutional as to already existing corporations."

Although the case was decided on the ground mentioned in the syllabus quoted above, the Court, speaking through Mr. Justice HOLMES, after discussing this point, said (p. 85):

> "Speaking for myself alone, I think that there are considerations on the other side from the foregoing argument that make it unsafe not to discuss the validity of the regulation apart from the supposition that the plaintiff in error had accepted it."

He then proceeded to consider whether this rate regulation was open to attack on the ground that it was unconstitutional because confiscatory. The rate regulation was sustained as an exercise of the police power, and also because the testimony did not clearly show that the rates were in fact confiscatory. Mr. Justice HARLAN held that the constitutionality of the act is necessarily involved, but he did not think (p. 88) that "upon any showing made by this

record" the rate regulation was unconstitutional as depriving the company of its property without due process of law.

This case is interesting because the rate regulation which was discussed was not a new rate regulation directing a company theretofore operating to charge a particular schedule of rates, but, on the contrary, was a statutory rate regulation on the statute books before the corporation was organized. The case is interesting from several points of view:

*First.*—The statute regulating the charge for school children was held to be an expression of legislative policy to the effect that school children should only pay one-half of the regular fare. The lower Court held that there might be a number of reasons which influenced the Legislature to enact a provision of this kind. This Court held that it was properly within the police power.

If the statute had prescribed specific rates, as, for example, five cents for adults and three cents for children, a different question would have been presented. The statute would not have been an expression of legislative policy to the effect that school children should be allowed to ride cheaper than others, but would have been a rate regulation to keep the rates down, and in the light of the opinion in the case the Court would probably have held that such rate regulation was unconstitutional and void because in violation of the 14th Amendment. A case of the kind suggested would be like one where a railroad corporation is organized under the laws of a state, which has theretofore enacted a two cents a mile statute. Such a company by accepting its charter in a sense accepts all of the pertinent legislation on the statute books at the time the charter issues, including the two cents a mile act, and yet it is hardly conceivable that if such two cents a mile statute should turn out to be confiscatory, such company would be barred from attacking the statute, because by the acceptance of its charter it had accepted this rate.

*Second.*—The general incorporation act of the State of Massachusetts under which this Company was organized contained an unusual express provision that the Company should be subject to all the duties, liabilities and restrictions of the general laws relating to street railway companies. This Court held that under this provision this statutory rate regulation was, for all practical purposes, written into the Company's charter. The Company could not keep the charter and escape liability to comply with the requirements of this rate regulation. In the present cases the objectionable rate schedules are written into the face of the franchise grants, but the Company has surrendered and abandoned those grants.

*Third.*—In this Massachusetts case the point set forth in the syllabus quoted above does not present any Federal question. The jurisdiction of this Court necessarily depended upon the application of the 14th Amendment. That question was sufficiently serious to justify the Court in maintaining jurisdiction. It does not appear that any question of jurisdiction was discussed in the case, but it necessarily follows that the jurisdiction of this Court must have depended upon the fact that this Federal question was presented.

We have spoken above, in that part of the brief (p. 41) in which we discuss the question whether the franchise grants were permissive only, of a class of cases to which Judge WESTENHAVER referred in his opinion (Record No. 715, pp. 82-3). These cases discuss particularly the question whether a railroad company is authorized to abandon a part or the whole of its line, if such part or the whole line cannot be operated profitably. Judge WESTENHAVER referred particularly to the case of *Southern R. Co. vs. Hatchett*, 174 Ky. 463, 192 S. W. 694, L. R. A. 1917-D, 1105. The second point in the syllabus shows the difference between that case and the present cases. It reads as follows:

"2. A solvent railroad cannot abandon the operation of an unprofitable branch without the consent of the authority which created it, even though there is no general public demand for such operation."

There is a Kentucky statute which is discussed in the case and which requires railroads to operate branches of more than five miles in length, and this particular branch was held by the Court to be within that class. A number of cases are cited in the opinion rendered in this Kentucky case, but the only bearing that the principles discussed in them have upon the issue involved in the present cases is that in so far as the decisions may be based upon protection given by the 14th Amendment, they show that that amendment is applicable as a protection against the enforcement of unprofitable operations upon a railroad company. This question was expressly made the basis of the decision in *Jack vs. Williams*, 113 Fed. 823, in the Circuit Court of the United States for the District of South Carolina. In that case the state on relation of interested parties undertook to force the defendants to maintain and operate a railroad line at an actual loss. Judge SIMONTON said (p. 827):

"A railroad is, in a sense, a public concern. To its construction and operation the action of the sovereign is needed. * * * The consideration for these acts of the sovereign is the utility of the enterprise to the public. To be thus useful to the public the road must be kept up in such a condition that life and property both must be made as safe as practicable. The rates of transportation of persons and freight must be reasonable and a reasonable number of trains must be kept up, dependent upon the circumstances surrounding the railway. Whilst thus serving the public, however, no corporation nor private person is obliged to continue the service without a reasonable remuneration. No one can be compelled to serve the

public for nothing. Private property of no kind, including railroad property, can be used for public purposes without compensation. *Smyth vs. Ames*, 169 *U. S.* 467, 18 Sup. Ct. 418, 42 L. Ed. 819; *Road Company vs. Sanford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560; *Chicago M. & St. P. R. Co. vs. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970; *Railway Co. vs. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858. All these cases determine that a railroad company in the full enjoyment and use and capacity to use its franchises cannot be compelled to exercise its franchises without reasonable remuneration. *A fortiori* a railroad company, or a person owning a railroad, cannot be compelled to operate that railroad not only without remuneration but at a loss. And this is not by any means because such corporation or person is insolvent. If a citizen has the wealth of the Rothschilds he cannot be compelled to use a dollar of his wealth for public purposes without compensation. What then is a person to do who becomes possessed of wholly unproductive railroad property? Sell it? * * * Repair it and put it in condition? But experience has shown that even when it was a new road and required no expense for repairs it barely paid operating expenses. Could the state or the public, in the face of the 14th Amendment, compel such expenditure involving certain loss?"

The Court refused to compel the defendants to maintain and operate the road. This case was affirmed in 145 Fed. 281. See also

*Commonwealth vs. Fitchburg R. Co.*, 12 Gray, 180;

*Sherwood vs. A. D. R. Co.*, 94 Va. 291, 26 S. E. 943;

*Ohio & M. R. Co. vs. People*, 120 Ill. 200, 11 N. E. 347;

*Northern Pac. R. Co. vs. Washington County*, 142 U. S. 493, 35 L. E. 1092;
*State vs. Old Colony Trust Co.*, 215 Fed. 307."

The 14th Amendment has been so frequently appealed to for protection against rate regulations imposed upon public utilities, theretofore operating under pre-existing franchises that we naturally have in mind those cases, when the 14th Amendment is appealed to by a public utility in a rate case. The cases last referred to show that the 14th Amendment applies with equal force as a protection against the enforcement of any alleged duty to continue to operate where the operations cannot be carried on at a profit. It is immaterial for the purposes of the present cases to consider whether a railroad company may be forced to operate an unprofitable branch, if the operation of that branch at a loss will not result in a loss upon the operation of the entire system; nor to consider those cases where reasonable regulations are imposed under the police power other than rate regulations. The only difficulty in applying the 14th Amendment in the present cases arises out of the suggestion that relief given under the 14th Amendment to the company would be relief against the company's contract. If that contract was a business or a proprietary contract the 14th Amendment would not apply. The franchise grants are not business or proprietary contracts, but are legislative enactments. They confer rights and privileges which the grantee and its successors are entitled to have protected under the contract impairment clause of the Federal Constitution; but being legislative enactments, the 14th Amendment applies as soon as it appears that the enforcement of such legislative enactments will result in the enforcement upon the street railway company of confiscatory rates of fare.

So soon as the company frees itself from the charge that it is undertaking to maintain the benefits of a franchise grant or contract, and at the same time is undertaking to escape

the burdens of such grant or contract, the enforcement of the objectionable legislation or action by the state comes within the spirit and intendment of the 14th Amendment.

The fact that the company had been, and at the time of the commencement of these actions was, engaged in supplying electricity for light and power for domestic and commercial use and power for war and industrial purposes in the City of Columbus and its suburbs (Record No. 739, p. 6), as well as operating street railway lines in the same territory, does not adversely affect the rights of appellants in these cases, for the following reasons:

(a) As averred (Record No. 739, p. 8) and by demurrer admitted to be true, the enforcement of the street railway rates would deprive appellants of their property without due process of law, and would render the further operation of *all* of the company's property not only impracticable, but impossible, both financially and otherwise, because the cost thereof, including taxes, depreciation and bond interest, *would far exceed its entire earnings received from all sources, and would soon reduce it to bankruptcy.* (Record No. 739, p. 9.)

(b) For the reason just stated, it is not financially possible, even if it were legally permissible, for the company to use revenue derived from the light and power department to make good the admitted losses in the street railway department.

(c) So far as the company is engaged in the light and power business as alleged in the bills, it was and is within the jurisdiction of the Public Utilities Commission of the State of Ohio, and subject at all times to its control and regulation in respect to rates and otherwise.

(d) The fact that the company is engaged in two kinds of public utility business is no bar to its right to reasonable compensation in each. Therefore, even if the company derived a profit from its light and power department the revenue so derived could not lawfully be appropriated to

pay the losses sustained in its street railway department. Each branch of the business must stand upon its own basis. The reports are full of cases where this has been very clearly established. *See Northern P. R. Co. vs. North Dakota ex rel. McCue*, 236 U. S. 588, 59 L. E. 735; *Norfolk & Western R. Co. vs. Conley*, 236 U. S. 607, 59 L. E. 746, and the numerous cases therein cited.

A very analogous case is *Knoxville Gas Company vs. City of Knoxville*, 253 Fed. 217, decided by the District Court for the Eastern District of Tennessee on September 23, 1918. The gas company filed a bill against the city asking for an injunction to restrain the city from enforcing the rates prescribed in the franchise grant under which it was operating. The first two points in the syllabus are as follows:

> "1. The voluntary acceptance by a gas company of an ordinance granting it a franchise on condition that it should never charge more than a stated price for gas to consumers created a contract which, if within the powers of the city, is binding on the company during its term.
>
> "2. A contract between a gas company and a city fixing a maximum price to be charged by the company for gas, if reasonable and valid when made, cannot be set aside by a court of equity as confiscatory and unconstitutional because subsequent conditions have made such rate unremunerative."

The court analyzed the grant and its acceptance and held that a contract was entered into, and that a court of equity could not relieve the company from its contract voluntarily and understandingly made. It appeared that the ordinance in Section 7 contained an express provision to the effect that the gas company shall at all times furnish gas to the people of the city and shall never charge for the same more than $1.10 per thousand cubic feet. This was an express agreement on the part of the company and differs

from the franchise grants in the present cases, which are permissive only, authorizing the company to occupy the streets and furnish street railway facilities and stating that it shall be entitled to charge the specified rates. The Knoxville Company did not undertake to surrender this franchise.

In this Knoxville case the court discussed (p. 223) two classes of powers possessed by municipal corporations, the one governmental and the other business or proprietary, and said:

> "The contract here is ordinancial in form, in the making of which I think the city officials were in the exercise of their business or proprietary functions."

The legislation under which the city acted was not very dissimilar from the legislation in Ohio, under which the City of Columbus acted in granting the two franchise grants, under which the present company operates, but, under the authorities heretofore cited, it seems absolutely clear that these two franchise grants were legislative enactments and not proprietary contracts. The 14th Amendment has no application to business or proprietary contracts. Such contracts do not represent state action and the 14th Amendment prohibits the *State* from depriving any person of his property without due process. Under the theory adopted by the District Court in this Knoxville case, the 14th Amendment naturally had no place. In this case there was no consideration of the line of cases herein cited under IV and sometimes referred to as war emergency cases. For these reasons it seems clear that the present cases can be distinguished from this Knoxville case.

## SUMMARY

Plaintiffs and appellants rely upon three propositions to sustain their claim that they are entitled to have the decrees entered in the lower court in these cases reversed. Their first proposition is that, if the language of the franchise grants is to be given its natural interpretation, these grants are permissive only and the company was justified

in surrendering and abandoning them, with the result that the situation is the same as it would be if these franchises had expired by lapse of time, or if they had been forfeited. If it should be held that some adequate reason must be given for the surrender and abandonment of these franchises, such reason exists in the present cases, because the rates, although reasonable when originally prescribed, had become unreasonable and confiscatory when the franchises were surrendered and abandoned on August 20, 1918.

The second proposition presented by plaintiffs and appellants is that, independent of the surrender and abandonment of these franchises, the war has created an unexpected contingency not contemplated by the parties when the grants issued and were accepted, and that this unexpected contingency presents a vital, radical and material difference in the performance of these franchise grants, with the result that the obligations of the contracts represented by these grants are no longer in force.

The third proposition is that the enforcement of the rate schedules prescribed in these franchise grants will result in the taking of private property for public use without just compensation, that is, that the company will be required to serve the public with street railway facilities at confiscatory rates, which will in effect deprive it of its property without due process of law in violation of the 14th Amendment.

Plaintiffs and appellants respectfully submit that the decrees in the above entitled cases should be reversed and that the prayers of the bills in said cases should be granted.

KARL E. BURR
HENRY A. McCARTHY
JOSEPH S. CLARK
HENRY J. BOOTH
W. O. HENDERSON
*Solicitors for Plaintiffs and Appellants*

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JAN 9 1919
JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

# No. 715.

THE COLUMBUS RAILWAY POWER AND LIGHT COMPANY, APPELLANT,

*vs.*

THE CITY OF COLUMBUS, OHIO, ET AL., APPELLEES.

# No. 739.

I. TUCKER BURR ET AL., APPELLANTS,

*vs.*

THE CITY OF COLUMBUS, OHIO, ET AL.

## REPLY BRIEF FOR APPELLANTS, PLAINTIFFS BELOW.

Appellees apparently rely with confidence upon certain cases cited in their brief, to which we wish to call the Court's attention.

*Fort Loramie vs. C. P. Gress*, cited at pages 44, 61 of Appellees' Brief:

At pages 43, 44 of their brief, opposite counsel say:

> "*The only decision in Ohio*, on the question of whether or not a franchise for a definite period with

> a schedule of operation, is permissive only or binding during the full term, is the case of Fort Loramie *vs.* C. P. Gress, which was decided by the Ohio Court of Appeals, Fourth Circuit, on the 9th day of July, 1918 (not yet reported). Later the Supreme Court overruled a motion to require the Court of Appeals to certify the record of this case, so that this decision stands as the final authority in Ohio."

This statement is not correct. Following the decision of the Court of Appeals in that case the plaintiffs in error, Gress and others, filed their motion to require the Court of Appeals to certify its record to the Supreme Court of Ohio for review. They also filed their petition in error in that Court *as a matter of right* because of the constitutional question involved in the case. It is true that the Supreme Court of Ohio on the 26th day of November last overruled the motion to certify the record, but that court, in doing so, expressly said:

> "While the case is one of public interest, the plaintiff in error may seek a remedy before The Public Utilities Commission of Ohio."

It is not true, therefore, that "this decision stands as the final authority in Ohio." The Supreme Court, by its decision, expressly pointed the parties to another remedy, viz: Before the Public Utilities Commission of Ohio, whose decision if it shall be adverse to the plaintiffs in error, is subject to review by the Supreme Court of Ohio.

The case has not yet been heard by that court upon the petition in error filed by the plaintiffs in error, and the case now stands for argument and submission on the 16th day of this month, the controlling question being the constitutional question involved, viz: Whether the judgment rendered by the Court of Common Pleas and affirmed by the Court of Appeals violates the prohibitions of the Fourteenth Amendment of the Federal Constitution.

*City of Potwin Place vs. Topeka R. R. Company*, 51 Kan., 609:

This case is cited and quoted from on pages 46, 47 of the brief of appellees. In this case, which is so confidently relied upon by opposing counsel, the company had operated certain lines of street railway in the city under an ordinance which authorized the construction of the road and required a stated car service on those lines. Potwin Place at the time when suit was brought had apparently become a part of the city of Topeka, and the railway company was of course operating many other lines in Topeka, in addition to those in the old city of Potwin Place. In furtherance of its plan to extend its lines through the addition of Auburndale and thence to the Insane Asylum, the company asked the city council to permit the abandonment of the then route through Potwin Place and to designate a new route through Auburndale in the direction of the asylum. The route proposed to be abandoned included Willow and Elmwood Avenues and two blocks on Laurel Avenue, and upon refusal of the council to grant the company's request, the latter ceased to operate its line on that route, and the city brought proceedings in mandamus to compel the company to resume operation there. The court ordered the resumption of service on Willow and Elmwood Avenues, but declined to order it as to the two blocks on Laurel Avenue, the latter on the ground that operation on Laurel Avenue might militate against adequate service for Auburndale, just as the company had claimed that it would. The case, therefore, is plainly distinguishable from the case at bar for several reasons, viz:

(1.) There the street railway company was not, as it is in the case at bar, attempting to surrender *in toto* its right to operate in the city, but, on the contrary, it was seeking in that case to *continue* operation, but over a new route.

(2.) The question was not one of confiscatory rates but of substituted routes.

(3.) The court, in refusing to order the operation of cars on Laurel Avenue definitely divided the company's franchise and permitted it to abandon a part of the franchise, while retaining the remainder of it, so that the case is not even an authority upon the point that a company must abandon all or none of its franchise rights.

(4.) The court in its opinion (page 11) says: "It is not seriously contended that the old line is unprofitable."

*Loader vs. Brooklyn Heights Railroad Co.*, 35 N. Y. Supp., 996:

This case which is cited on pages 48 and 74 of brief of appellees, did not involve operation that would result in bankruptcy, nor was *vis major* an element in the case, as it is in the cases at bar.

*Paige vs. Schenectady R. Co.*, 178 N. Y., 102:

This case is cited at page 49 of appellees' brief. It simply dealt with the right of the company to abandon its route on a certain street; and none of the elements of the cases at bar were present in it.

The last three cases typify most of those cited by opposite counsel, and consequently it is not worth while to distinguish them *seriatim*.

A large part of appellees' brief is devoted to an effort to establish that the Columbus Company is bound by the rate schedules in the two franchise grants. If these two grants are still in force, appellees' claim that the company is bound by the rate schedules therein prescribed, would be stronger. These grants were expressly surrendered and abandoned by

See Cleveland v. Cincinnati Co. 67 O. St. 197
Wood v. Columbus, 220 Mass. 41
Shaw v. Ry Co, 173 Fed. 751

the Columbus Company by written communication addressed and delivered to the city of Columbus August 20, 1918. If this surrender and abandonment was justified and effective, the franchise grants are no longer in existence, and the rate schedules are likewise no longer in existence. The rate schedules, by reason of changed conditions, became confiscatory, and appellants used them as the basis for the surrender and abandonment of the franchise grants, claiming that this situation brought the Columbus Company within the scope of the Fourteenth Amendment. Appellants do not rely upon the Fourteenth Amendment as a protection against the enforcement of the rate schedules only, but as a basis and justification for the surrender and cancellation of the franchise grants and a protection against their threatened enforcement. The issue presented between the parties on this branch of the case is whether the surrender and cancellation of the grants was justified under the Fourteenth Amendment. The Fourteenth Amendment prohibits the State from depriving the Columbus Company of its property without due process of law. The franchise grants were legislative enactments, being laws of the State enacted by the city under delegated power. The enforcement of these laws would require the company to devote its private property to public use without just compensation, and would, therefore, deprive it of its property without due process of law. The application of the Fourteenth Amendment seems clear.

The appellees contend that the rate schedules in the franchise grants do not represent the exercise of legislative power by the city, but rather the exercise of its proprietary or business power, and that the enforcement of the rate schedules would not be the enforcement of State action. The rate schedules are so closely indentified with the franchise grants, being one of the "terms or conditions" of those grants, that it is difficult to separate the two. The *grants of the franchises* are clearly legislative enactments, even if the rate

schedules evidence an exercise of the city's proprietary or business powers. It must always be remembered that appellants are endeavoring to enjoin, not directly, the enforcement of the rate schedules, but, on the contrary, the enforcement of the franchise grants—the enforcement of the exercise of the franchises which the city has granted—, and, incidentally only as the result of the granting of the relief prayed for, the city will be enjoined from enforcing the rate schedules. There is no basis for the contention that the injunction prayed for is not an injunction against threatened State action.

Appellees further contend that the company is estopped from asserting any claim for protection under the Fourteenth Amendment. They rely upon the contracts evidenced by the two franchise grants and acceptances to establish the estoppel. They argue that each grant and acceptance represents a contract, and that each contract binds the company to continue operations thereunder for the term of twenty-five years therein prescribed, and that this obligation continues in force even though the prescribed rates are confiscatory and the result would necessarily be bankruptcy. There is no obligation in either one of these franchise grants to continue operations thereunder for the term of twenty-five years therein mentioned upon the terms and conditions therein prescribed. Even if the grants contained such agreements, the result would not be different, for the Fourteenth Amendment must be read into each grant, and each grant must be interpreted so that each provision of the grant will be given its proper effect. If the grants did, in fact, contain an agreement to continue operation for the term named, which we deny, the interpretation would probably be that this agreement would have no further force and effect if the rates prescribed should become confiscatory. This would present a question of interpretation. Appellees, in order to sustain their position, must establish an estoppel, something

in the nature of a waiver by the company of its right to claim the protection of the Fourteenth Amendment. On the admitted facts any such agreement to continue operations under the grant would not constitute a basis for any such estoppel.

In this connection, we have been considering the case on the supposition that these grants contained an agreement on the part of the company to continue operation thereunder for the term therein named. *There is no such agreement;* the grants are permissive strictly, granting to the company the *permission* of the city to occupy the streets for street railway purposes upon the "terms and conditions" therein named. There is no language, either in the ordinances or in the acceptances, which impose any obligation upon the company to continue to exercise the franchises or privileges granted for the term named. So far as these contracts are concerned, the franchises and privileges granted might be surrendered at any time. The terms and conditions named are terms and conditions which, if not complied with, would justify a forfeiture by the city of the franchises and privileges granted, but the language will not justify the interpretation that the company has entered into any contractual obligation to continue to comply with these terms and conditions for any longer period than it cares to exercise the franchises.

If it be claimed that there is something in the nature of a duty imposed upon the company to continue to serve the public, and that this duty requires the company to continue to serve the public upon the terms and conditions for the period prescribed in these grants, the fact that the rate schedules have become confiscatory is a complete answer, for it is an adequate reason for the surrender and cancellation of these particular grants and is sufficient to satisfy the suggested duty. The company is quite ready and willing to serve the public if the public will allow it to charge com-

pensatory rates. These franchise grants present no basis for the suggested estoppel.

Plaintiffs and appellants respectfully submit that they are entitled to the injunction for which the bills pray.

KARL E. BURR,
HENRY A. McCARTHY,
JOSEPH S. CLARK,
HENRY J. BOOTH,
W. O. HENDERSON,
*Solicitors for Plaintiffs and Appellants.*

CITY OF COLUMBUS, a c

Defendant and Appellant,

SUGGESTION

ON QUESTION WHETHER THESE CASES HAVE BECOME MOOT CASES.

HENRY A. McCARTHY,

JOSEPH S. CLARK,

Attorneys and Counsel for A. Taylor Allen, et al.,

Plaintiffs and Appellants.

IN THE

# Supreme Court of the United States

October Term, 1918. No. 739

---

I. TUCKER BURR, *et al.*
*Plaintiffs and Appellants*

vs.

CITY OF COLUMBUS, *et al.*
*Defendants and Appellees*

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## SUGGESTION ON QUESTION WHETHER THESE CASES HAVE BECOME MOOT CASES

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*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

NOW COME I. Tucker Burr, Winthrop Burr, A. Lawrence Pierson, Thomas S. Gannett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler and William J. Sturgis, plaintiffs and appellants in case No. 739 and file this their suggestion upon the question whether said case No. 739 has now become a moot case.

Your petitioners respectfully represent that the abovementioned case No. 739 presents primarily the question whether the street railway franchises under which the railway lines of the The Columbus Railway, Power and Light Company were operated prior to August 20, 1918, were on that day cancelled and surrendered by said company. Your petitioners contend that said franchises were on that day cancelled and surrendered, but, on the other hand, the defendants and appellees contend that said company had no such right or power and that said franchises were not in fact cancelled and surrendered. The bill prayed for an

injunction against the defendants to restrain them from enforcing the terms and provisions of the said franchises. The District Court denied this prayer. This case was set down for hearing in this court on January 6, 1919, together with the case of The Columbus Railway, Power and Light Company vs. City of Columbus, *et al.*, No. 715, which presents similar questions, and the two cases were argued together on January 10, 1919.

In a suit entitled Slaymaker vs. The Columbus Railway, Power and Light Company, *et al.*, in the Court of Common Pleas of Franklin County, Ohio, a stockholder of said company, suing for herself and other stockholders, filed a bill on December 23, 1918, against the company, all of its directors and certain other defendants, for the purpose, *inter alia*, of recovering from the said directors heavy damages alleged to have resulted to the company from the effort of the said directors to cancel and surrender said franchises. In this same case the stockholder, plaintiff, asked that a receiver be appointed to take possession of and to operate the properties and franchises of said Columbus Company. The application for a receiver was heard on January 6, 1919, and the hearing was continued on January 8th, and again on January 10th. The court, during the hearings on the 6th and the 8th, indicated an intention to appoint a receiver, in part because of the attempted cancellation and surrender of the railway franchises, as recited above, which the court held was an illegal, unauthorized and invalid act on the part of the company.

On January 9, 1919 there were several changes in the Board of Directors of the Columbus Company, certain directors resigning and others being elected directors in their places and at a meeting of the Board of Directors of the company held on the evening of January 9, 1919, the following resolution was adopted:

> "*Resolved*, that this Company rescind the action of its Board of Directors and officers to surrender its

street railway franchises and that operation of its street railway system be immediately resumed, in accordance with the terms of its franchises."

At the hearing in said Slaymaker case, on January 10th, a copy of this resolution was presented to the court and the testimony of one of the directors of the company was taken, advising the court of many material facts. The application for a receiver was denied on that day.

Your petitioners further represent that in a communication dated January 27, 1919, addressed to the Hon. James D. Maher, clerk of this Court, by the City Attorney of the City of Columbus, one of the defendants and appellees in the above-recited two cases, said City Attorney enclosed a paper containing a copy of said resolution and suggested that perhaps these cases may have become, by virtue of the above-recited resolution, moot cases and in said communication the City Attorney stated that he was advising the court of the passage of this resolution in order that he might perform his full duty to this Court, but expressed his desire that the cases should be decided.

Your petitioners further represent that this resolution may perhaps be effective to reinstate the franchises which the company had theretofore undertaken to cancel and surrender and, further, that if the directors were liable for their attempted cancellation and surrender, this liability may be limited to such damages, if any, as may have resulted to the company between the date of the resolution of surrender and cancellation, August 20, 1918, and the date of the above recited resolution, to-wit, January 9, 1919, but your petitioners deny that either case No. 739 or case No. 715 has become a moot case by reason of the adoption of the above-recited resolution by the Board of Directors of the Columbus Company and in support of this position your petitioners present the following reasons:

1. If it be admitted that the said franchises were in fact cancelled and surrendered by the resolution of the

Board of Directors of the company, adopted on August 20, 1918, and the action taken in pursuance of that resolution and it be further admitted that the effect of the above-recited resolution of January 9, 1919 is to reinstate said franchises, it is none the less true that a new attempt may be made at any time by the company to cancel and surrender the said franchises and it is important that both the company and the city should have the question determined whether such right of cancellation and surrender exists or not. The rights of the parties in this regard should be determined as a guide for further future action and the question of the existence or non-existence of this right is not only important for said parties and for the people of the City of Columbus, but is at the present time, in the present condition of the street railway industry of the country, a question of great public interest and importance.

In similar cases this court has retained jurisdiction and determined the questions presented. See *United States vs. Trans-Missouri Freight Assn.*, 166 U. S. 290, 41 L. Ed. 1007 and *Southern Pacific Terminal Co. vs. Interstate Commerce Commission*, 219 U. S. 498, 55 L. Ed. 310. This subject was later considered in *United States vs. Hamburg-Amerikanische Co.*, 239 U. S. 469, 60 L. Ed. 387, in which this court dismissed the appeal on the ground that the case had become a moot case, but without prejudice to further proceedings. The distinction between that case and the two cases last cited was pointed out. The present case comes within the principle of said last two cases. See also *Boise City I. & L. Co. vs. Clark*, 131 Fed. 415, 419 and *Jewell T. Co. vs. Plaut*, 240 Fed. (C. C. A.) 945 and cases there cited.

2. Under the agreement set forth in Section 15 of the amended bill in No. 715 (Record p. 49) and also set forth in Section 17 of the bill in No. 739 (Record p. 9) relating to the issue of rebate checks, such checks aggregating over $100,000, have been issued by the company and are now outstanding in the hands of the public and the liability of the

company to redeem these checks depends upon the decision of this court in these cases. Even if it be admitted that the effect of the above-recited resolution of January 9, 1919 is to reinstate the said franchises, such resolution cannot have the effect of imposing liability upon the company to redeem said rebate checks, but that liability must necessarily depend upon the question whether the company had the right to cancel and forfeit said franchises and did cancel and forfeit them by its resolution of August 20, 1918 and action taken in pursuance thereof, and this question is the principal question presented in these cases.

3. If it be admitted that the rights of the company in case No. 715 may have been materially affected by the adoption of the above-recited resolution by its Board of Directors on January 9, 1919, and on that account said case No. 715 may be held to have become a moot case (which your petitioners deny) the same is not true of case No. 739, for the reason that certain rights accrued to the plaintiffs and appellants in No. 739 by virtue of the resolution of cancellation and surrender adopted by the Board of Directors of the company on August 20, 1918 and the cancellation and surrender thereby effected, which said rights said plaintiffs and appellants are asserting in No. 739 and they cannot be and were not deprived of said rights by the above recited resolution of January 9, 1919. The enforcement of said franchises would necessarily result in injuring and wasting the mortgage security for the bonds held by your petitioners and, in addition, the interests of your petitioners would be materially injured by the payment of over $100,000, by the company in redemption of rebate checks, for which your petitioners claim that the company is not liable. The City Council of the City of Columbus took no action in pursuance of and in relation to the said resolution of August 20, 1918, nor has it taken any action in pursuance of or in relation to the above recited resolution of January 9, 1919.

4. No party to either of the pending two suits has as

yet asked that they or either of them be declared moot cases and dismissed on that account.

Your petitioners respectfully submit that these two cases are not moot cases and should not be dismissed on any such ground.

Respectfully submitted,

HENRY A. MCCARTHY
JOSEPH S. CLARK
*Attorneys and Counsel for I. Tucker Burr, et al., Plaintiffs and Appellants.*

February 21, 1919.

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# Supreme Court of the United States

## OCTOBER TERM 1918.

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THE COLUMBUS RAILWAY, POWER & LIGHT COMPANY,

Appellant,

vs.

THE CITY OF COLUMBUS, OHIO, ET AL.,

Appellees.

[No. 715.]

I. TUCKER BURR, ET AL.,

Appellants,

vs.

THE CITY OF COLUMBUS, OHIO, ET AL.,

Appellees.

[No. 739.]

---

**Appeals from the District Court of the United States for the Southern District of Ohio, Eastern Division.**

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## BRIEF FOR APPELLEES, DEFENDANTS BELOW.

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### STATEMENT OF THE CASE.

As the appellants' statement of the case seems to us to be very incomplete, we take this opportunity of immedi-

ately placing before the court those additional facts which seem material and relevant. As the ruling of the court below on the motion for a temporary restraining order is not before the court, we will confine ourselves to the allegations of the bills of compiaint and to the contents of the two franchise ordinances, which are attached as exhibits to the bills. The correctness of the allegations of the bills we must of course concede for the purposes of the motions to dismiss, the rulings on which are before this court for review.

The subject matter of the two bills is identical with the exception of a few additions and a few omissions in the later bill. The only important difference is that no diversity of citizenship was claimed in the first bill, The Columbus Railway, Power & Light Company being an Ohio corporation and all the defendants being residents of Ohio. After the first case was argued before Judge Westenhaver on a motion to dismiss, and it was apparent that the Judge believed no Federal question was stated in the bill, the second case was filed in the name of citizens of other states who were alleged to be the holders of $200,000 of a first mortgage issue of $1,500,000. The name of the trustee under that mortgage is recited in the petition, but no statement is made as to the corporate existence or residence of such trustee, nor is there any allegation that such trustee has had any notice of the filing of this suit, or refused to be made a party to the suit.

The bills allege that the appellant Company, an Ohio corporation formed for the purpose of constructing and operating a street railway system in the City of Columbus and county of Franklin, owned and operated in the City of Columbus a street railway system, consisting of

110 miles of track, under the terms and provisions of two franchise ordinances, to wit: One known as the Blanket Franchise, passed on February 4, 1901, renewing to The Columbus Railway Company, its successors and assigns, for the term of twenty-five years, the right to maintain and operate under the terms and conditions therein stated street car lines in certain streets of the city, it being one of the stated purposes of the ordinance to provide for the operation under uniform terms and conditions of all the lines of the grantee, formerly exercised under franchises which had expired, would soon expire or were for indeterminate periods; the other known as the Central Market Franchise, passed January 21, 1901, granting to the Central Market Street Railway Company, its successors and assigns, for the term of twenty-five years, the right to construct and maintain a single or double track street railway in certain streets under the terms and conditions therein set forth. All the right, title and interest of the grantees was conveyed by deeds to the appellant Company on January 29, 1914, and March 1, 1907, respectively.

The Blanket Franchise provided (Section 27) that it should take effect only after "the filing by said Columbus Railway Company, with the City Clerk of said city, of its acceptance in writing of each and all the terms, provisions and requirements of this ordinance;" and the Central Market Franchise provided (Section 25) that it should take effect only after "the filing with the City Clerk of said city by said company of a written acceptance of its terms and conditions."

The bills allege that said franchises were duly accepted in writing by the grantees, and that under and by virtue of said franchises the said grantees and their successor,

the appellant Company, operated said street railway systems until August 20, 1918, when the said appellant Company notified the City Council that it had terminated and abrogated said franchise grants.

Each of said franchises provide that the grantee, its successors and assigns, shall during the full term of twenty-five years furnish complete and adequate service for the traveling public, and further sets forth minimum schedules for operation on each of the streets named in the franchise grants. These and other mandatory provisions are set forth in another section of this brief.

As a reason for the attempted surrender of August 20, 1918, to which it is not alleged or claimed that the mortgage trustees consented or even had notice, there is set forth, beginning at Section 9 of the first bill and at Section 10 of the second bill, the increasing costs of operation. In the first bill it is alleged that the mortgages against the Street Railway part of the company's property amount to $7,295,000 with annual interest charges of $353,000, and in the second bill the amount of bonds so apportioned against the street railway property is $8,600,000 and the annual interest charge $400,000. It is alleged that for the year ending June 30, 1918, the net income, after deducting operating costs, taxes and "a proper charge for depreciation," is $341,987.00. This was insufficient to pay the interest on the mortgage bonds by $11,000 under the allegations of the first bill, and by approximately $100,000 under the allegations of the second bill. It is not stated what deduction was made for depreciation, but we may safely assume that their estimate was 5% of the alleged value of the property ($12,000,000), or $600,000. Such depreciation is theoretically a sinking fund for future replacement pur-

cases, so even if we concede that mortgage bonds, issued on the first day of April, 1915, (see paragraph 11 of the second bill) have priority over the claim of the public based on the underlying franchise grants of 1901, there would be a balance of $500,000 in the operating revenues for the year ending June 30, 1918, to stave off the dangers of the insolvency alleged. For the year ending June 30, 1919, it is anticipated that the operating revenues will be insufficient by $250,000 to meet the operating expenses, taxes and a proper charge for depreciation. The "proper charge for depreciation," estimated above at $600,000, is more than sufficient to meet the deficiency of $250,000 and the interest charge of $333,000 as stated in the first bill, and is only $50,000 short of enough to pay the interest charge as stated in the second bill. This is not a bad showing for the lean year of the twenty-five year contract and it emphasizes the elasticity of the "short time" within which bankruptcy is predicted.

In paragraph 10 of the first bill the Company illustrated the increasing cost of operation by comparing the cost of coal and labor for 1916 with that of 1917. By adding the difference in these two bills alone to the net income for the year ending June 30, 1918, we were able to argue to Judge Westenhaver that the Company was making a fair profit in 1916 on its alleged investment, over and above its depreciation and other charges, notwithstanding the abnormal world war prices then existing. As a consequence those allegations do not appear in the second bill.

The big increase in the operating expense for the current year is accounted for by the increase in the wage account. It is alleged in paragraph 11 of the first bill

and paragraph 13 of the second bill that in June, 1918, a controversy arose between the street railway company and its employes, resulting in a strike and discontinuance of service for two days, and "was referred to the National War Labor Board for decision, and that Board on July 31, 1918, rendered its decision the result of which is that plaintiff must increase the wages of its street railway employes more than 50 per cent." As a result of this increased cost it is alleged in the first bill that the operating expenses are not sufficient to enable it to maintain its property in good order and repair and perform its duty as a public utility, and to this there is added in the second bill that further operation at said rates is impractical and "would bankrupt the company within a short time."

On the twentieth of August, 1918, the said appellant Company addresed a notice in writing to the City of Columbus, the Mayor, the City Attorney and the City Council to the effect that it thereby surrendered and cancelled, for the reasons therein stated, both the Blanket and the Central Market Franchises, but that it would continue to operate until notified to withdraw from the streets by the City, and charge passengers riding on its cars a five cent fare and one cent for transfer—a net increase of 62 and 95 per cent, respectively, over the rates agreed upon in the franchise contracts, namely, eight tickets for 25 cents and free transfers.

As a basis of their right of action against these defendants, complainant say in paragraph 14 of the first bill and paragraph 16 of the second bill that the defendants threaten to and will, unless enjoined by this court, attempt to force said Company to continue to operate its street railway property under said Blanket Central Mar-

ket franchises upon all the streets of said city, and to force it to continue to sell eight tickets for 25 cents and to give universal free transfers; and that said threat of the defendants, if carried out, would compel the said Company to carry passengers upon its said lines at unjust, unreasonable, inadequate and confiscatory rates in violation of said Fourteenth Amendment of the Constitution of the United States and to the great and irreparable harm of the plaintiff, as herein set forth. It is not alleged or claimed that the defendants intend to do anything other than to file a suit for the specific performance of the contracts.

By the 19th paragraph of the bill reasons for the jurisdiction of a court of equity are attempted to be stated, but since they are nothing but mere conclusions, and not statements of ultimate facts, it is unnecessary to repeat them.

The main prayer of the bill in each cause is for an injunction, restraining and forever enjoining the defendants from forcing or compelling or attempting to force and compel said appellant Company to operate its lines of street railway under said ordinances, and from enforcing or compelling or attempting to force or compel the said Company to charge and collect the rates of fare prescribed by the said ordinances, and from in any way enforcing or attempting to enforce against said Company the aforesaid two franchise ordinances or either of them, or any provision of either of them.

Judge Westenhaver sustained the City's motion to dismiss the first bill on two grounds, namely, for want of jurisdiction and because no valid cause of action in equity was stated in the bill. Judge Hollister did not enter into a discussion of the jurisdictional question, but based his decision, sustaining the City's motion to dismiss, on the ground that no valid cause of action in equity was stated in the second bill.

## ARGUMENT

In opening this argument we cannot refrain from stating our belief that there is here disclosed to this court a case which is unique in the history of the country; and that never were such high-handed tactics used by a public utility company, even in the conscienceless days of the past, as this deliberate scrapping of a contract under which the Company had enjoyed most valuable proprietary rights for seventeen years, and in this attempt to secure the protection of the Federal Courts in its enjoyment, without the contractual restrictions, of the rights conferred by such a contract. Our primary contention is that these appellants have no right of action against the city to enjoin it from proceeding to enforce the contract, inasmuch as the city is guilty of no breach and threatens no arbitrary action, but only that it will proceed by due process of law for the specific performance of the contract.

Our reply to the argument for the appellants, which might properly be used in defense to an action by the city, but not in support of such an affirmative suit by the appellants, may be summarized as follows:

1. Under the Ohio Statutes in force at the time of the passage of these ordinances, and still in force, full power was delegated to Columbus to enter into these franchise contracts, whereby the city and the public should receive street car service for a definite period at an agreed rate of fare in consideration for exclusive proprietary interests in the public streets for a street car system. Such a contract is protected by the impairment clause of the United States Constitution. The power of the city

to make the grant being conceded in appellants argument, the Company is estopped from questioning the agreed provisions.

2. Under the specific provisions of these comprehensive franchises the clear duty is imposed upon the Company to furnish adequate street car service during the entire twenty five years at the fixed rate of fare.

3. The increased cost of operation resulting from the war, together with the award by the National War Labor Board in the wage controversy between the Company and its employes, voluntarily submitted to the Board as a result of the parties being unable to agree on a fair rate of wages, do not constitute a vis major or an implied condition not in contemplation of the parties, resulting in the termination of the contract. The economic effect of war upon prices is not a vis major, nor does the settlement of a wage controversy, which the appellants should have settled themselves in order to perform their public duty without cessation, constitute such a force. Nor is there an implied condition which would authorize this court to relieve the Company from what is temporarily a hard bargain.

4. No surrender of the franchises was effected by the letter of August 20th, 1918, for the following reasons: (a) For the reasons stated in subdivisions 1, 2 and 3, the franchises cannot be terminated without the city's consent; (b) If the franchises were only permissive, or could be terminated on the ground of an implied condition, the attempted surrender by the Company is not effective, because (1) the consents of the mortgage trustees, who represent large investments based on the franchise rights, have not been secured nor have said trustees been made parties to this suit or otherwise notified

of the procedure of the appellant Company, so that they can enforce the franchise contracts against the city, there having been no cessation of operation, (Old Colony Trust Co. vs. Omaha, 230 U. S., 100), and (2), the verbal destruction of the franchises is ineffective to relieve the appellants from the obligations thereof, while they still continue to enjoy the privileges received at the time of their acceptance.

We are willing to concede that this year is **the** lean year of this twenty-five year contract, but that is certainly no reason for the cancellation of this contract, even if this court, in such a case as this, could relieve a party from a hard bargain. In the statement of the case we called attention to the fact that the "proper charge for depreciation" concealed a big fund which would tide the Company over this lean year, and postpone very materially the "short time" period in which bankruptcy is threatened. This "short time" period has now been tested, and has already outlasted the war, and now bids fair to outlive war prices. This test illustrates most strongly the unfair menace to all contracts, which would result from an approval by this court of the new and radical propositions of law contended for by these appellants.

## THE JURISDICTIONAL QUESTION.

In the first case deprivation of property without due process of law in violation of the Fourteenth Amendment is depended upon as establishing the Federal question and the right of action as well, while in the second case diversity of citizenship is alleged for the Federal question, but the right of action still depends upon the Fourteenth Amendment. As the motions to dismiss

raised both the question of jurisdiction and the merits of the cases, namely, whether a cause of action is stated in favor of the appellants in each case, we propose to state our propositions under this heading very briefly.

As to the first case we contend that there is no real and colorable, but only a fraudulent and fictitious Federal question stated in the bill, and that the jurisdiction of the court has not attached for any purpose. This rule is recognized in the cases cited by Judge Westenhaver and by opposing counsel. Penn Mutual Life Insurance Co. vs. Austin, 168 U. S. 685; Siler vs. Louisville & Nashville R. R. Co. 213 U. S. 175, 191.

We contend further, in the words of Judge Westenhaver, (page 86):

> "And even when the threatened act may be the impairment of a contract, or the deprivation of property without due process of law, still if the only means threatened to be used are resort to the courts or to legal proceedings, a case is not stated within the jurisdiction of a Federal Court. Such seems to me to be the present case."

For authority see the following: **St. Paul Gas Light Co. vs. St. Paul**, 181 U. S., 143; **Defiance Water Co. vs. Defiance**, 191 U. S., 184; **Des Moines vs. Des Moines, etc., R. R. Co.**, 214 U. S., 179.

The cases last cited are exactly in point against the contention of counsel in the court below that the city's action in enforcing the contract was the wrong complained of, while now the wrong seems to be their own agreement. This later contention is disposed of by the case of **Interstate Consolidated Street Railway Co. vs. Mass.** 207 U. S. 79; 52 L. Ed. 111:

> Syllabus. "A street railway company whose charter subjects it to 'all the duties, liabilities, and restrictions set forth in all the general laws now or

hereafter in force, relating to street railway companies', is bound by the requirements of a statute previously enacted, that street railway companies shall transport school children at a reduced rate, although such statute may be unconsitutional as to already existing corporations."

Opinion page 84:

"This court is of the opinion that the decision below was right. A majority of the court considers that the case is disposed of by the fact that the statute in question was in force when the plaintiff in error took its charter, and confines itself to that ground. * * * The railroad company would have come into being and has consented to come into being subject to the liability, and could not be heard to complain. Rockport Water Co. vs. Rockport, 161 Mass., 279; Ashley vs. Ryan, 153 U. S. 436, 443; Wight vs. Davidson, 181 U. S. 371, 377; Newburyport Water Co. vs. Newburyport, 193 U. S. 561, 579."

Certainly then this Company, and its privies, will not be heard to complain that the considerations, which the Company and its predecessors agreed to give for valuable grants, are unlawful or deprives them of their property without due process of law. It follows that this Federal question is not colorable, but wholly fraudulent and fictitious, as Judge Westenhaver held.

Coming now to their former theory of the case, namely, that the city's threat to enforce the contract was an act depriving them of due process of law. It is not alleged that the city will take any arbitrary action, or will pass any measures which have the force and effect of laws, so as to subsequently deprive the parties of existing rights. In the absence of such allegations it must be assumed, as Judge Westenhaver stated, that the city will proceed through the regular channels of the law to enforce the

contract; and the duty in such case is imposed by the statutes of Ohio upon the city solicitor, **Section 4312 of the General Code** providing as follows:

> "When an obligation or contract made on behalf of the corporation granting a right or easement, or creating a public duty, is being evaded or violated, the solicitor shall likewise apply for the forfeiture or the specific performance thereof as the nature of the case requires." (Note: the words "shall likewis apply" refers to these words of the preceeding section: "The solicitor shall apply in the name of the corporation to a court of competent jurisdiction for etc.")

This case is therefore on all fours with the St. Paul, the Defiance and the Des Moines cases above cited. In fact in those cases the cities took one more step by passing ordinances or resolutions declaring their several intentions not to recognize existing contracts. In the **Defiance** case (Defiance Water Co. vs. Defiance, 191 U. S. 184) the city had begun its action in the courts through the city solicitor attacking the contract of the Water Company. In the **Des Moines** case (Des Moines vs. Des Moines City Ry. Co., 214 U. S. 179) the street railway franchise rights were questioned by an ordinance of council which ordered the company to remove its tracks in twenty-five days and, upon its failure so to do, directed the city solicitor to proceed to enforce the city's rights. In that case this court said that no jurisdiction was warranted because there was no assumption that the city solicitor would do more than proceed by suit to test the rights of the company.

How then will suits to enforce these contracts violate the due process of law guaranty of the Fourteenth Amendment? The procedure of the city is the very es-

sence of due process, and we submit that no colorable Federal question is made in the first case.

In the second case diversity of citizenship is alleged as the ground of Federal jurisdiction. The allegations of the bill are identical with those in the first case, and it is apparent that this case was filed "for the sole purpose of founding a jurisdiction which otherwise would not exist."

The first questions that suggests itself in this case is the status of the appellants, and their right of action. They are the holders of bonds in the amount of approximately $200,000 of a first mortgage issue of $1,500,000, under the terms of which mortgage the Gerard Trust Company is the trustee. The corporate existence and residence of the trustee is not set forth in the bill. The Company's action in surrendering the city franchises, if effective, would seriously endanger the security of the whole mortgage issue. The Company then is impairing the obligation of a contract, in which the Gerard Trust Company, as trustee for all the bondholders, has a very vital interest.

It is held by this court in the case of **Old Colony Trust Co. vs. Omaha**, 230 U. S. 100, that the trustee in a mortgage on the property of a lighting company can maintain suit on the company's franchises, although the company lost in the prior suit, if the mortgage rights were acquired before that suit and the trustee had not been made a party. In that case the city attempted to terminate the franchise rights.

Assume then for the purpose of argument that the city accepted the surrender of its franchises by the appellant company. There is no allegation that the mortgage trustees in this case has any knowledge of the Company's

action. Certainly it did not join in the letter sent to Council, as its signature is absent from the exhibit in this case, and certainly it is no party to either of these suits. In view of the fact that the Company still continues operation, and the surrender of the franchises has been merely verbal, cannot the trustee resist an action by the city for the forfeiture of the franchises?

One case has been cited by opposing counsel in which a suit by bondholders to enjoin trespassing by strikers on the property mortgaged endangering a mortgage security, was sustained on the ground that the action was outside of the duty imposed upon the trustee. (Carter vs. Fortney, 170 Fed. 463.) This case is entirely different, in that the surrender of the mortgage security itself is proposed by the parties to these suits. No one but the trustee can make this decision for the bondholders.

It is thus apparent that there is no right of action whatever in these bondholders; and further that the Company's paper surrender of the franchises is no surrender at all.

The opinion in the case of **Dawson vs. Columbia Trust Co., 197 U. S. 178,** has an important bearing in that it very conclusively disposes of a collusive attempt of the mortgagee of the Dawson Water Works Company to found Federal jurisdiction on the ground of diversity of citizenship for the purpose of avoiding a prior decision. This suit was dismissed for want of jurisdiction on the ground that:

> "The waterworks company is deemed to have been a necessary party, and it, like the defendant city, was a Georgia corporation. It was made a defendant, but the court will look beyond the pleadings and arrange the parties according to their side in the dispute. When that is done it is obvious that the waterworks company is on the plaintiff's side

and was made a defendant solely for the purpose of re-opening in the United States Court a controversy which had been decided against it in the courts of the state."

The reasoning of the above opinion can be applied with equal force to the present case.

## UNDER OHIO STATUTES FULL POWER DELEGATED TO CITIES TO ENTER INTO BINDING STREET RAILWAY FRANCHISE CONTRACTS

These franchise contracts were entered into in 1901, and the Ohio statutes in relation thereto in force at that time are to be found in Bates' Revised Statutes of 1897. They appear in full in the margin of the opinion of this Court in the case of Cleveland vs. Cleveland City Railway Co., 194 U. S. 517, 48 Law Ed. 1102, 1106 and 1107. The right of cities to enter into street-railway franchise contracts under the power conferred by those statutes, and the binding effect of such contracts on the parties thereto was determined by this court in that case.

Certainly after reading these statutes no reasonable person can entertain a doubt as to the policy adopted by the Legislature of Ohio in relation to street railways. Every section evinces the Legislature's intent to vest the city with complete proprietary control for the benefit of and as the business agent of the public. The city was vested with the title of all the exclusive property rights it was necessary for a street railway company to acquire in order to construct and operate its system in the public streets. That low rates of fare for the benefit of the public was to be the consideration for the grant of such exclusive property rights is apparent by the re-

peated reference to the subject of rates. That such a contract is an exercise of the proprietary function, rather than the governmental function, is emphasized by the cases cited in the next subdivision.

This power was delegated to cities, and this intention of the Legislature was manifested as early as 1861, when the first street railway law was enacted (58 O. L. 66). Section 5 of this Act provided:

> "That hereafter no street railway shall be constructed or commenced until the consent of the city and council or corporate authorities of the city, town or village, wherein such road is to be constructed shall have been first obtained; and it shall be competent for the city council or corporate authorities of any city, town or village, to agree with any street railway company * * * desiring to construct a street railroad in such city, town or village, upon the manner and upon the terms and conditions upon which such corporation, individual or company of individuals shall construct and operate a street railroad in such city, town or village; * * *."

This law was next supplemented in the year 1866 (63 O. L. 55), and repeatedly thereafter until at the time of the granting of these franchises Ohio had the complete set of statutes, which appear in the margin of Bates' Revised Statutes of 1897, the important feature of which may be summarized as follows:

> "Section 2501: No corporation, individual, or individuals shall perform any work in the construction of a street railroad until application for leave is made to the council in writing, and the council by ordinance shall have granted permission and prescribed the terms and condition upon, and the manner in which, the road shall be constructed and operated, and the streets and alleys which shall be used and occupied; and the council may renew any such grant at its expiration upon such conditions as may be considered conducive to the public interests."

Section 2502: This section requires certain preliminaries on the part of city officials before the street railway route can be established; required public notice of the application for a franchise, and further that, "no such grant as mentioned in said preceeding section shall be made except to a corporation, individual, or individuals, that will agree to carry passengers upon such proposed railway at the lowest rate of fare." It provides further that, "no grant or renewal of any grant" shall be valid for a greater period than twenty-five years, and "that after such grant or renewal of grant is made the municipal corporation shall not, during the term of such grant or renewal, release the grantee from any obligation or liability imposed by the terms of such grant or renewal of a grant."

Section 2505 authorizes the councils of cities to grant permission by ordinance for the extension of existing street railways if deemed by the council to be beneficial to the public, and provides that the rate of fare for carrying passengers on the line so extended shall not be increased by reason of such extension.

> "Section 3443: Council, or the commissioners, as the case may be, shall have power to fix the terms and conditions upon which such street railways may be constructed, operated, extended and consolidated."
>
> "Section 3443-12: Such street railway companies may consolidate on the terms and conditions applicable to the consolidation of railroad companies; provided, however, no increase of fare shall be allowed on any street railroad route by reason of such consolidation."

## THESE CONTRACTS WERE MADE BY THE CITY IN ITS PROPRIETARY CAPACITY

We emphasize this proposition because opposing counsel concede that in such a case the appellants are not deprived of "due process of law" and the basis of their action therefore fails. (See page 7 of their brief, also page 76.) If these franchises are contracts, made by the city in the exercise of its proprietary power, then they are not governmental acts depriving the appellants of the "due process of law", but the very acts of the appellants themselves, estopping them from denying the validity of any of the terms and conditions. The contractual and proprietary nature of the relationship of the parties under these franchises eliminates the objection Mr. Justice Holmes had to the majority opinion in the case of Interstate Consolidated Street R. Co. vs. Massachusetts (207 U. S. 79). It conclusively negatives the right of appellants to claim that their own promises denied them the "due process of law."

This theory that an Ohio city's function in entering into a street railway franchise contract is proprietary, is established by a recent decision of the Ohio Supreme Court, quoting opinions of this court in support of its position. The case I refer to is **Interurban Railway & Terminal Co. vs. Public Utilities Commission of Ohio,** decided June 21, 1918, 98 O. S. 287; Ohio Law Reporter of December 9th, 1918, page 447. The facts in this case were that the Village of Pleasant Ridge granted a franchise to an interurban company upon the condition that, in case of annexation to the City of Cincinnati, the company should not charge a rate of fare in excess of 5 cents. After annexation was affected, the company re-

fused to comply with this provision and the City of Cincinnati brought an earlier action in the Common Pleas Court, which is known as Interurban Co. vs. Cincinnati, 93 O. S. 108, to enjoin the charging of the increased fares. The company's answer in that case set up the fact that it was required to pay 3 cents of this fare for the use of the tracks of another company in Cincinnati, and that the enforcement of the fare would drive it into bankruptcy, and in fact had driven it into the hands of a receiver at the time it sought to file an amended petition in the Court of Appeals. The court affirmed the judgment in favor of the city.

Thereafter the company began the suit, first referred to above, before the Public Utilities Commission, asking said Commission to exercise the governmental rate-making power, alleged to have been vested in it by the State Legislature, to the extent of increasing the rate of fare so as to make the same compensatory. The city's demurrer to the complaint was sustained by the Commission, and its decision affirmed by the Supreme Court. The following are the branches of the syllabus relating to this branch of the argument:

> 3. "A contract concerning proprietary rights, and harmless in itself, made by a municipality in the exercise of power clearly conferred, is protected by the Constitution, and the police power cannot be invoked to abrogate or impair it."
>
> 4. "The statutes of Ohio which create the Public Utilities Commission and define its powers do not confer authority on the Commission to change rates fixed by the terms of valid contracts made by a public utility with a municipality in the exercise of powers clearly conferred upon it."

In the opinion Judge Johnson quotes from Chief Justice White's opinion in the Cleveland case (194 U. S. 517)

at page 533 to show that street railway contracts in Ohio were binding, and further quotes from the **Walla Walla case,** 172 U. S. 1, and the Vicksburg case, 206 U. S. 496, to prove that contracts of this class are proprietary in their nature, and being innocuous cannot be abrogated or impaired by the subsequent exercise of the police power. Part of his opinion, beginning with the last sentence from his quotation from the Walla Walla case is as follows:

> "'But where a contract for a supply of water is innocuous in itself, and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it.'
>
> "And in **Vicksburg vs. Vicksburg Water Co. 206 U. S. 496,** it was held that a state may, in matters of proprietary rights, exclude itself and authorize its municipal corporations to exclude themselves, from the right of regulation of such matters as water rights. At page 508 of the opinion it is said: 'That a state may in matters of proprietary rights, exclude itself from the right to make regulations of this kind, or authorize municipal corporations to do so, when the power is clearly conferred, has been too frequently declared to admit of doubt.'"

In the very recent case of **Knoxville Gas Co. vs. City of Knoxville,** 253 Fed. 217, in which the company sought to escape from the binding effect of the rate provisions of its franchise, the court refers to a similar contention of the plaintiff as follows:

> "In other words, the contract made by the authority of the ordinance is unilateral and hence voidable by either party. This contention I think is made and reputed in **Omaha City vs. Omaha,** 147 Fed. 1, 77 C. C. A. 267, where it is pointed out that municipal corporations have two classes of powers, the one governmental, in the exercise of which their officers may not bind the municipalities beyond their terms of office; the other business or proprietary, in

> the exercise of which they are governed by rules as individuals or private corporations. The contract here is ordinancial in form, in the making of which I think the city officials were in the exercise of their business or proprietary functions."

The Omaha case defines the proprietary class of powers, as distinguished from the governmental, as the means by which it acts and contracts for the private advantage of the inhabitants of the city and of the city itself. So here in relation to our street railway franchises, the city is interested in getting adequate street car service over a definite period of years at the lowest rate possible in return for the grant of the right to a certain exclusive use of the streets, and this is distinctly done for the individual advantage of the citizens and of the city itself.

Opposing counsel refer to these franchises as legislative grants and cite cases in which they are incidentally so referred to, seeking to leave the impression that such franchises are held to be an action of the city in its governmental capacity rather than in its proprietary capacity If this is for the purpose of showing that the contract is an unilateral one, as suggested in the Knoxville case, we need only refer to the Interurban Railway & Terminal case, 98 O. S. 287, above cited, in which it is not only held that neither party to the contract can abrogate it, but also that the Public Utilities Commission of Ohio has no such power and cannot be vested by the Legislature with such power.

This is also the holding of the Supreme Court in the case of the **City of Cincinnati vs. Public Utilities Commission of Ohio,** 98 O. S. 320, decided June 21, 1918, in which it was decided that a gas franchise, in which a rate was fixed for ten years and the means provided of

thereafter determining the rate during the remaining fifteen years of the franchise, was not effected by the subsequent creation of the Public Utilities Commission and the vesting in such Commission of the power to pass upon the reasonableness of all municipal rate ordinances. The most pertinent parts of the syllabus are as follows:

> 7. "The provisions of Section 614-44 G. C. were not intended to, and do not apply to a contract made prior to the passage of that section and which, by its terms, does not expire for more than one year.
>
> 8. A contract, such as above described, which is passed in full compliance with authority expressly conferred, is protected by the provisions of Section 10, Article 1 of the Federal Constitution, that no state shall pass any law impairing the obligation of contracts."

If complainants contend that these franchises are legislative acts for the purpose of showing an act of the city depriving it of "due process of law", then our reply is that they have no contract or other right of which they are deprived by these franchise contracts; that they are not denied of "due process of law" by their enforcement, and are estopped to deny the validity of their own contracts under which they have received and enjoyed valuable rights. But this question is treated under other headings. Suffice it is to say that they cannot point to a single case in which the enforcement of one's franchise agreement was held to deprive him of "due process of law."

## THE FRANCHISE CONTRACTS ARE NOT PERMISSIVE MERELY, BUT IMPOSE SPECIFIC DUTIES UPON THE GRANTEES, THEIR SUCCESSORS AND ASSIGNS, DURING THE ENTIRE TERM OF TWENTY-FIVE YEARS

We emphasize this premise because appellants admit that, if this proposition is true, their attempted surrender of August 20, 1918, is ineffective and they must continue to operate in accordance with the provisions of the franchise. (Pages 17, 19 and 20).

We will discuss the cases bearing upon the abandonment of its public duty by a public utility in a later section of this brief, but at this time we desire only to call attention to the very clear provisions of the ordinance. In not a single street railway case in the country, or in any case relating to any public utility, have the courts annulled a franchise under the conditions existing in this case, when the duties imposed upon the utility were as clear and specific as they are under these very comprehensive ordinances.

In considering these franchises the court should bear in mind the broad delegation of power to Ohio cities under statutes, which clearly evince the legislative intent to place in the hands of cities full power to bargain for street railway service at the lowest rates and under terms most favorable to the public in consideration for the grant of proprietary rights in the streets.

Appellants quote from the opinion in the case of Delaware & Hudson Canal Co. vs. Coal Company, 8 Wall, 276 to the following effect:

> "Undoubtedly necessary implication is as much a part of an instrument as if that which was so plainly implied was expressed."

In these cases it is not necessary to resort to this rule of necessary implication, as the Company's duties are expressly stated. In the street railway cases cited by appellants, the existence of a schedule of minimum operation, without any express reference to the entire term of the contract, has always been conceded to impose a duty which the Company cannot abandon. The court will notice in the following sections quoted that not only are minimum schedules specified, but it is provided that full and adequate service shall be given during the entire term of the franchise. (P. 17-20 Record, No. 715.)

**Blanket Franchise** (Ordinance No. 17801.)

"Section 17. Said Company shall, as rapidly as the requirements of its railroad system and the efficient service of the public demands, **during the life of this grant,** expend not less than $1,000,000 in extensions and betterments, and **shall, at all times during the life of this franchise, furnish upon all its lines efficient and adequate service and a sufficient number of first-class, commodious cars for the accommodation of its patrons.**"

"Section 21. Said The Columbus Railway Company, its successors and assigns, shall be entitled to charge fares within the corporate limits of said city **during the term herein** provided at the following rates, **and no more,** to wit:" (Here follows several paragraphs in relation to rates of fare and transfers.)

"Section 22. Between the hours of 5:30 A. M. and 12 o'clock midnight cars **shall be run** at intervals not to exceed the following, viz: High Street, between north and south corporation lines, 10 minutes; Schiller Street and High Street, to north corporation line, 10 minutes; Long Street, 6 minutes; Main Street and Neil Avenue, 6 minutes; State and Oak Streets, 7 minutes; Livingston Avenue and Fourth Street, 10 minutes; Leonard Avenue and Camp Chase, 11 minutes; Mt. Vernon Avenue and Cemetery, 11 minutes; Central Market line, 15 minutes; Pennsylvania and Parsons Avenue, 10 minutes; be-

tween the hours of 12 o'clock midnight and 5:30 o'clock a. m. cars shall be run, starting at 1 o'clock a. m. and continuing until 5 o'clock a. m. hourly upon High Street, West Broad Street and on two lines to be hereafter designated by said city, running easterly from High Street."

"Section 23. **Upon the expiration of the term** of the renewal franchise herein granted said company shall, unless a further renewal be granted by said city, remove all its tracks, wires and other appliances from the streets and avenues of said city and leave the portion of each and every street occupied by its lines in good condition, corresponding in finish and material with the remainder of such streets and avenues."

**Central Market Franchise.** (Ordinance No. 17802.)

(P. 27-29 of Record.)

"Section 14. Cars **shall be run** by said grantee, and its assigns, at no longer intervals than fifteen minutes, unless prevented by unavoidable casualty, and shall be operated regularly between 8 a. m. and 10 p. m. on Sundays, and between 5:30 a. m. and 11:30 p. m. on all other days; and said grantee and its assigns shall not run a train of more than three cars, including the motor, on any of its lines in said city."

"Section 18. As a consideration for the grants herein made, the said The Central Market Street Railway Company, and its assigns, shall pay to the City of Columbus the following per cent. upon the gross receipts of said company for local passengers' fares received within said City of Columbus, to wit: Two per cent. of said fares **during the term of said franchise.**"

"Section 19. This grant is made **and shall continue in force for the full period of twenty-five (25) years** from and after the twenty-third day of April, 1900, and all franchises and grants to said grantee and its assigns for extension of lines, turnouts, switches, connections or additional lines of street railway connected with, or to be connected with the lines of street railway of said grantee and its as-

signs, authorized and permitted under this ordinance, shall be considered a part of the system of railway hereby authorized, and shall expire and wholly terminate with the expiration of the franchise and grant authorized under the terms of this ordinance."

"Section 21. **Upon the expiration of the term** of twenty-five (25) years, provided by this ordinance, unless such grant has been renewed or extended by said city, the City of Columbus shall have the right by giving two years' notice, in writing, before the expiration of said term of twenty-five years, of its intention so to do, to purchase of the said grantee and its assigns."

From these sections and from the other sections of the franchises it is apparent that the parties agreed upon a scheme of street railway operation to take care of the service needed by the City of Columbus for the entire term of twenty-five years. It is absurd to argue in view of these complete provisions that the parties intended the grantees to have the right to abandon service at any time desired. The result of such abandonment, namely, the loss of street railway service, the tearing up of the city's streets, and the other chaotic conditions existing in cities where franchises have expired, were the very conditions which the city would be most anxious to avoid.

Certainly these duties, which are just as binding upon the Company as if imposed directly by the state, must be performed by the grantees during the entire term of the contract.

## THESE DULY ACCEPTED FRANCHISES ARE BINDING UPON BOTH PARTIES DURING THEIR ENTIRE TERM OF TWENTY-FIVE YEARS.

At page 25 of their brief appellants admit that "the franchise grants were contracts controlling rates of fare so long as they continued in existence". While accepting their admission, it is nevertheless necessary in a general way to review the decisions, pointing out the exact nature of the contract relation, in order that in the next subdivision of this brief we may show why the company cannot destroy these franchises by a mere stroke of the pen.

In an earlier subdivision we pointed out that the statutes of Ohio delegated to cities full and complete power to contract for street railway service for definite terms not to exceed twenty-five years, and definitely imposed upon such cities the duty for the benefit of the public to incorporate in such contracts, as the consideration for the property rights granted, as low a rate of fare as the grantee would accept. Opposing counsel incidentally referred to the fact that Section 2501 provides that the original contract shall "prescribe the terms and conditions" upon which the road shall be constructed, while a renewal is to be made "upon such conditions as may be considered conducive to the public interests". That the Legislature intended to draw no distinction in the use of these terms is settled beyond doubt by the succeeding sections, which are uniform as to original grants and renewal grants, providing equally that no grantee shall be released from any obligation or liability of either the original grant or renewal; that in the case of an ordinance

granting the right to extend an existing street railroad, the rate of fare shall not be increased; and that in case of consolidations no increase of fare shall be allowed. These references prohibiting the increase in fare apply alike to the extension of lines covered by original and renewal grants, and if the Legislature had not intended the rate of fare to be a condition of the renewal grant, this provision would serve no purpose. But it is unnecessary to discuss this further, as the identical sections were considered by this Court in the case of renewal grants by the City of Cleveland in the Cleveland case, (194 U. S., 517). It is to be noted that the statutes required a definite term to be fixed and forbade either an original grant or renewal grant for the construction and operation of a street railway in any city for a longer period than twenty-five years.

We have already discussed these statutes and cases bearing upon the proposition to show that this delegation of power was exercised by the city in its proprietary capacity, as business agent acting for the private benefit of its citizens and itself, and that the contract resulting from the exercise of such power was not a governmental act, but like an ordinary contract and protected from impairment by the United States Constitution.

As pointed out in the statement of facts, the bill alleges that the grantees duly accepted these franchises, granted to them, their successors and assigns, and that such acceptance as required by the ordinances was "the filing by the said The Columbus Railway Company with the city clerk of said city, of its acceptance in writing of each and all the terms, provisions and requirements of this ordinance," and in the second ordinance "the filing

with the city clerk of said city by said company of a written acceptance of its terms and conditions".

Certainly there is no formality lacking in the execution of these contracts. The rate of fare was an essential term and condition of the contracts, made so by the express command of the Legislature. The life of the contract was also an essential term and condition of the contracts, made so by a like command. By its acceptance of the terms, conditions and requirements of the franchise ordinances, the grantees accepted the rates of fare therein provided and the life of the franchises as therein stated. They also specifically agreed to give full and adequate street car service during the entire life of the franchises.

The Blanket franchise ordinance itself was held by the Circuit Court of Ohio, in the case brought in 1902 on the relation of the prosecuting attorney, to be a contract, the conclusion being reached in these words:

> "We have already seen that the statutes such as those under consideration delegate the power to a city to bind itself by contract and not merely power to license."
>
> **State ex rel. v. Columbus Railway Co.**, 1 O. C. C. (N. S.), 145, 160.

In the opinion of Judge Westenhaver the nature of this contract relation was the primary and controlling question in the whole case, and was conclusively settled to his mind by the decision of this court in the case of **Cleveland v. Cleveland City Railway Co.**, 194 U. S., 517. As Judge Westenhaver gave this case very careful consideration, and wrote a very able opinion, we take the liberty of quoting at some length his conclusions on the question of the contract relationship, as follows:

> "**The primary and controlling question**, in my opinion, depends on the nature of the relation cre-

ated between the complainant and the city by these franchise grants. This relation is settled beyond controversy by numerous decisions of the Supreme Court of Ohio and of the Supreme Court of the United States. The statute law of Ohio in force when these ordinances were passed were sections 2501, 2502, 2505, 2505b, 3443, 3443-12, Bates Annotated Statutes of Ohio. They are copied in full in the margin, 194 U. S., 531-34. These sections, slightly different only in phraseology, are now sections 3768 to 3777 and 9101 to 9139 of the Ohio General Code. Cases construing these sections and defining the rights and burdens created by franchise ordinances, such as are now under consideration, are the following: Railway Company v. Village of Carthage, 36 O. S., 631, 634; City of Columbus v. Street Railroad Company, 45 O. S., 98; Interurban Company v. Cincinnati, 93 O. S., 109; Cleveland v. Cleveland City Railway Company, 194 U. S., 517; Cleveland v. Cleveland Electric Railway Company, 201 U. S., 529; Cleveland Electric Railway Company v. Cleveland, 204 U. S., 116.

The holding of all these cases is uniform. Of them the leading one is Cleveland v. Cleveland City Railway Company, 194 U. S., 517. **The law as settled** by these cases is that the legislature has by these sections delegated to municipal corporations full power and authority to enter into binding contracts for the maintenance and operation of street railway lines; that whatever the city in fact does pursuant thereto is the act of the state and is mutually binding upon the parties. Franchise grants for fixed terms not exceeding twenty-five years, and for a fixed rate of fare to continue during the term of such grants may lawfully be made by the city under this legislative delegation of power. If the city passes an ordinance purporting to grant a franchise for a fixed term with a rate of fare to endure during that term, and this ordinance is accepted expressly or impliedly, a contract is engendered mutually binding and unalterable, except by the consent of both parties, during the term thereof.

In **Cleveland v. Cleveland City Railway Company**, 194 U. S., 517, all these rules are fully stated and upheld. The question there was whether or not the ordinances under consideration had in fact created a

contract at a fixed rate of fare for a definite term, thereby extinguishing a right reserved to the city in earlier ordinances of increasing or diminishing the rate of fare."

(Then follows a quotation from page 536 of the opinion of Mr. Justice White:)

'The other cases are equally in point, and, inasmuch as no conflict exists therein, a review of them is unnecessary. Numerous cases illustrating and applying the same rule are contained in the United States Supreme Court Reports arising under municipal ordinances of other states. A citation of them is for the same reasons superflous.'

We cannot emphasize too strongly the **Cleveland** case, because it is an exact parallel of the two cases at bar. The decisions of the case required the court to construe the very statutes which the court is called upon to construe and pass upon in these cases. In that case the original franchise ordinances were succeeded by renewal, extension and consolidation ordinances, all fixing rates of fare. Subsequent to the passing of the last franchise ordinance, the city passed a rate ordinance under a power reserved in the original ordinance, but not reserved in the later ordinances. The court held that the later franchise ordinances were contracts in every sense of the word, and bound the parties for the entire period of twenty-five years, during which stipulated time "obligations were imposed upon the corporations to continue those benefits". We quote several pertinent observations from the opinion of Mr. Justice, now Chief Justice White, (page 534):

"The question for decision, then, is, Did the consolidation ordinance of February, 1885, and the ordinances thereafter passed and accepted, already referred to, constitute binding contracts in respect to

the rates of fare to be thereafter exacted upon the consolidated and extended lines of the complainant?

That in the courts of Ohio the acceptance of an ordinance of the character of those just referred to is deemed to create a binding contract is settled. * * * But let us consider the question without treating the Ohio decision as conclusive. * * * That in exercising its powers it was the intention of the city to avail of the authority conferred by section 3443 of the Revised Statutes of Ohio, 'to fix the terms and conditions upon which street railroads may be constructed, operated, extended and consolidated', and that it was also the intention of the city to execute binding agreements in respect to the rates of fare to be thereafter charged by the railroad companies, will, we think, become clearly apparent by considering the language employed in the ordinances. Thus, in the ordinance of February 16, 1885, fixing the terms and conditions upon which the West Side Street Railroad Company and the Woodland Avenue Railway Company, and the tracks of those companies, might be consolidated, it was specifically provided 'that for a single fare from any point to any point on the line or branches of the consolidated road, no greater charge than five cents shall be collected, and that tickets at the rate of eleven for fifty cents or 22 for $1.00 shall at all times be kept for sale on the cars by conductors'. The acceptance of this ordinance by the railroad companies affected thereby was required to be in writing and filed with the city. Like provisions were contained in the ordinance of April 8, 1887, authorizing the laying of the additional track and the extension of the lines of the Woodland Avenue and the West Side Street Railroad Company, * * *. The ordinance of August 12, 1887, authorizing a further extension, and the ordinance of June 20, 1892, authorizing the double tracking of a portion of the line, contained similar language.

In reason, the conclusion that contracts were engendered would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time and no reservation was made of a right to alter; that by those ordinances existing rights of the corporation were surrendered, benefits

were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, and the fact that a written acceptance by the corporations was required, we can see no escape from the conclusion that the ordinances were intended to be agreements binding upon both parties, definitely fixing the rates of fare which might be thereafter charged. Taking all of the circumstances above referred to into account, the case before us clearly falls within the rule as to the binding character of agreements respecting rates applied in Detroit v. Detroit Citizens Street R. Co., 184 U. S., 368, and approvingly referred to in Knoxville Water Co. v. Knoxville, 189 U. S., 437."

It is to be noted that even the provisions of the ordinances are identical as to the method of acceptance, as to rates of fare and the requirement that tickets be kept for sale. (See Section 21 of the Blanket franchise, page 19 of the record).

In reply to the contention of counsel that these franchises are merely permissive, we wish to put special emphasis on the conclusion of Chief Justice White, that these ordinances for definite terms imposed the obligation upon the corporation to continue the benefits of the service provided by the franchises during the stipulated time. In this connection we wish also to call attention to the granting clause of the Blanket franchise as follows:

"The Columbus Railway Company is, and its successors and assigns are, hereby granted the franchise and right, and are hereby authorized and empowered to maintain and operate its lines of street railroad upon and over each and all of said streets and avenues, and parts of streets and avenues, aforesaid, for said period of twenty-five years, from and after the passage of this ordinance, upon and subject to each and every of the terms, conditions, stipulations and requirements hereinafter prescribed, and

subject to the requirements of the general ordinances of the City of Columbus, Ohio." Record, p. 13.

If it was not the intention of the parties to assume mutual and binding obligations during the entire period, why was it necessary to make any mention of twenty-five years? The statutes in force at the time limited all street railway grants to a maximum period of twenty-five years, and without any mention of that period the grantee would have had a right to exercise the privileges conferred during that period, but would not have been under the same binding obligation to continue. But as we have pointed out in an earlier section of this brief, the provisions of these ordinances are most complete and provide not only a minimum schedule of operation, but also that the company "**shall, at all times during the life of this franchise, furnish upon all its lines efficient and adequate service and a sufficient number of first-class, commodious cars for the accommodation of its patrons**". (Section 17 of the Blanket franchise.)

Certainly these franchises clearly evince the intention upon the part of the parties to provide a complete scheme of street railway service during the entire life of the franchise, and to give any other effect would be to do violence not only to the apparent intention, but to the express terms of the instruments. The decision in the Cleveland case alone is sufficient to submarine the first four contentions of opposite counsel in these causes, but the decision of this court in **Detroit v. Citizens Street Railway Co.**, 184 U. S., 368, and the decision in the case of **Knoxville Water Co. v. Knoxville**, 189 U. S., 437, both of which this court followed in the Cleveland case, finish the destruction of their contentions.

In the Detroit case, as in the Cleveland case, the suit

was to enjoin the enforcement of certain ordinances, which reduced the rates of fare on various city railways fixed by former franchise ordinances, the city claiming that the franchise ordinances did not constitute binding contracts as to rates of fare. The Michigan statutes, as pointed out by Chief Justice White in the Cleveland case, are very similar in the power conferred upon cities and many of the observations of Mr. Justice Peckham in the Detroit case are directly applicable to this case. We quote as follows:

(Page 385):

> "It is plain that the legislature regarded the fixing of the rate of fare over these street railways as a subject for agreement between the parties, and not as an exercise of a governmental function of a legislative character by the city authorities under a delegated power from the legislature. It was made a matter of agreement by the express command of the legislature. Ordinances of a like nature were passed by the common council relating to the other companies, and all of them were accepted in writing, and they all had in them provisions relating to, or referred to ordinances providing for, the rate of fare in language similar to the foregoing.
>
> Coming to a consideration of the effect of the language used, we think it amounted to a contract as to rates of fare."

Then the opinion quoted this from another case which had been previously decided by this court: **(City R. Co. v. Citizens Street R. Co.**, 166 U. S., 557):

> " 'The original ordinance of January 18, 1864, was plainly a proposition on the part of the city to grant to the company the use of its streets for thirty years, in consideration that the company lay its tracks and operate a railway thereon upon certain conditions prescribed by the ordinance. This proposition, when accepted by the company and the road built and operated as specified, became a contract which the state

was not at liberty to impair during its continuance; but if, at the expiration of the thirty years, the road had been sold to another company, and that company had applied for and obtained from the common council a franchise to occupy its streets for another period, it seems to be clear that such a contract would need no other consideration to support it than the continued operation of the road under such conditions as the city chose to impose.'

Although in that case there was no provision in the statute directing that the rates of fare should be established by agreement, yet nevertheless it was held that the language used amounted to an agreement upon the subject-matter which could not be altered during its continuance by either party."

The parallelism between this cited case and the causes at this bar now is so obvious that it is unnecessary to consume much time on it. This court expressly said and decided in the cited case that the Legislature of Michigan authorized the city "to make a contract or agreement like the ordinance in question, including rates of fare." So here, for the same reasons, the Legislature of Ohio authorized the City of Columbus to make the contracts and agreements constituted by the passage of the ordinances and their acceptances, and they include the rates of fare.

This court decided, in the cited case, that "among the most material and important of the terms and conditions which might be imposed by the city" was the rate of fare; that the rate of fare naturally and legitimately "would be a subject for grave consideration and conference between the parties"; and "when determined by mutual agreement, the rate would naturally be regarded as fixed until another rate was adopted by a like agreement." All of this can be equally predicated of the transaction between the City of Columbus and the grantees in the two ordinances. This court further said in the cited

case that the rate of fare "was made matter of agreement by the express command of the Legislature." And in City Railway Co. v. Citizens' Street Railway Co., 166 U. S., 557, this court declared that the ordinance of the council of Indianapolis "was plainly a proposition on the part of the city to grant to the company the use of its streets for thirty years, in consideration that the company lay its tracks and operate a railway thereon upon certain conditions prescribed by the ordinance. This proposition when accepted by the company and the road built and operated as specified became a contract." This is equally true of the ordinances now under consideration in this court.

Opposing counsel's repeated insistence that these franchise contracts are legislative enactments because the rate-making power is governmental, is futile. Under the decisions above cited Columbus acted in its proprietary capacity in making a franchise contract, and fixing therein as one of the considerations for the grant certain agreed rates. Such a case is entirely different from the exercise of the governmental power of rate-making, which is, as its name indicates, an arbitrary legislative act of the sovereign without the consent of the one whose property is affected. Such action is governmental in its nature, but that power may be suspended by a contract and the contracting parties are protected under the contract impairment clause of the United States Constitution. Regardless of where the governmental power is vested, it cannot be exercised during the continuance of these franchise contracts against the grantees thereunder.

When opposing counsel say that these franchise contracts do not bind the state, they entirely overlook two very recent decisions of the Supreme Court of Ohio. The

**City of Cincinnati v. Public Utilities Commission of Ohio,** decided June 21, 1918, (98 O. S., 320), and the **Interurban Railway & Terminal Co. v. Public Utilities Commission of Ohio,** decided June 21, 1918, (98 O. S., 287), Ohio Law Reporter of December 9, 1918, page 447. In the latter case a street railway franchise was in question, and as the case is quoted from at some length in an earlier portion of this brief, (page —), it is unnecessary to again state the facts. From this opinion there can be no doubt as to the opinion of the Ohio Supreme Court as to this contention of opposing counsel. The court said this of Ohio street railway contracts:

> Syllabus 3. "A contract concerning proprietary rights, and harmless in itself, made by a municipality in the exercise of power clearly conferred, is protected by the constitution, and the police power cannot be invoked to abrogate or impair it.
>
> Syllabus 4. The statutes of Ohio which create the Public Utilities Commission and define its powers do not confer authority on the commission to change rates fixed by the terms of valid contracts made by a public utility with a municipality in the exercise of powers clearly conferred upon it."

The opinion also sets forth the facts and conclusions of the court in the case of **Quinby et al. v. Public Service Commission,** decided April 5, 1918, by the Court of Appeals of New York, 119 N. E., 433, in which a similar conclusion was reached.

To the same effect was the decision by the Supreme Court of Ohio in the first case cited **(Cincinnati v. Public Utilities Commission),** in which it was held that a provision in a gas franchise, fixing a rate for a limited period and providing a method for subsequent determinations during the life of the franchise, was binding upon the parties; and that, inasmuch as Ohio statutes gave the

city power to enter into such a contract, statutes subsequently passed conferring appellate jurisdiction upon the Public Utilities Commission over gas rates, should be construed not to apply to a contract made prior to the passage of the later law; and that such a contract "is protected by the provisions of Section 10, Article I of the Federal Constitution, that no state shall pass any law impairing the obligation of contracts."

With the Ohio situation so clearly defined by these decisions of this court and of the State Supreme Court, it would avail nothing to discuss the entirely different questions presented by the laws of California and Wisconsin, as analyzed by the State Supreme Courts and approved by this Court.

**We come now to a consideration of the cases, pertaining to the duty of a street railroad company to furnish service during the entire term of a contract, when for a definite term.**

In beginning this discussion we can do no better than quote the convincing words of Judge Westenhaver, beginning at the top of page 82 of the record, a few paragraphs removed from the termination of the last quotation from his opinion:

> "No question is made but that the franchise grants now being considered did by their terms purport to create a binding contract as to the rate of fare for a term of twenty-five years. It follows from this settled law that a contract has been engendered, mutually binding upon the city and upon the owner of these franchises; that this contract requires the owner during the entire term of twenty-five years to furnish street railway service at the rates of fare therein provided, and that neither the complainant nor the city during this term has the right to change or alter that rate without the consent of the other.

> The impairment-of-contract and the due-process-of-law clauses of the Constitution have often been invoked to prevent cities from impairing franchise grants, or forcing a reduction in the contract rate, and the courts have uniformly, despite all criticism, sustained and upheld them and, in so doing, have vindicated the law.
>
> It is equally the duty of the courts to uphold these contracts and vindicate the law when it is the grantee therein, and not the city which is seeking to change the terms thereof without the consent of the other party. It is of primary importance that contracts should be upheld by the courts, for the right to contract and the binding obligation of contracts once made lie at the foundation of all public and municipal law."
>
> "This proposition is really the controlling of all questions argued, but a brief consideration of other questions presented should perhaps also be made."

Opposing counsel appear to take a great deal of consolation from the language in the Interurban cases (93 O. S., 108; 98 O. S., 447) and the Columbus Street Railway case (45 O. S., 98), in which cases the court, in holding that the companies could not escape from the obligations of their franchise contracts, used the language "as long as it enjoys this franchise." The question of whether the company could escape by surrendering the franchise or tearing up its contracts was not before the court, nor in any way in issue. Those franchises were not for a definite period, and as far as the record shows there was no provision in any of the franchises from which the obligation to operate for a specific period could be implied. The language was used simply to guard against too broad a statement of the rule.

**The only decision in Ohio,** on the question of whether or not a franchise for a definite period with a schedule of operation, is permissive only or binding during the

full term, is the case of **Fort Loramie vs. C. P. Gress,** which was decided by the Ohio Court of Appeals, Fourth Circuit, on the ninth day of July, 1918, (not yet reported). Later the Supreme Court overruled a motion to require the Court of Appeals to certify the record of this case, so that this decision stands as the final authority in Ohio. The suit was for an injunction against the First National Bank of Bremen, Ohio, and the Western Ohio Railway Company, to prevent them from ceasing operation of the Loramie and Minster Railroad. The cross-petition of the bank asked that it be permitted to dismantle and junk the railroad property on the ground that it would be unprofitable and confiscatory to continue operation.

As recited in Judge Allread's opinion, concurred in by the other two judges, the franchise ordinance granted to the company, its successors and assigns, "a franchise to construct and operate for twenty-five years an electric street railway in West Main street of that village, and by Section 10 of the ordinance the grantees were required to furnish service from Fort Loramie to Minster." In that section no direct reference is made to the term of the franchise, but it is provided that the owners "shall maintain thereon passenger cars * * *, and such cars shall be run at least as often as the Western Ohio Electric Company, * * * shall be run at such times as to make direct and immediate connection with all regular passenger cars leaving said village of Minster," etc. The relevant part of the opinion is as follows:

> "The question as to the obligation of a public service corporation to continue service under a franchise for a definite period of time with mandatory provisions for operation has not been determined by

our Supreme Court in any case which has come to the notice of the court.

Many decisions are cited upon the charter obligation of the public service company to continue the service, but we think the question as to the duty of the Minster and Fort Loramie Company to continue service under its state charter is not the controlling question. We are of the opinion that this case must be decided under the franchise ordinance and the obligations created thereby. We are of the opinion that when the Minster and Fort Loramie Company accepted the franchise ordinance of the Village of Fort Loramie, occupied Main street in said village and began the operation of the railway the ordinance became a contract. **Gas Co. vs. Akron,** 81 O. S., 33; **Interurban Co. vs. Cincinnati,** 93 O. S., 108; **Interurban Co. vs. Public Utilities Commission,** 98 O. S.

It is clear that the ordinance contract was binding upon the village. The village could not after acceptance revoke the right of the company to occupy its streets. If the contract was binding upon the village the reciprocal covenants of the ordinance which are presumed to form the consideration of the contract were also binding upon the railway company. A franchise ordinance might be drawn so as to give the public service corporations merely a right without fixing any definite obligations to continue service, but this ordinance goes farther and charges upon the public service corporation and its assigns certain mandatory duties as to the continuance of the service. When the Minster and Fort Loramie Company, therefore, accepted the benefit of the ordinance it was bound by the duties therein imposed.

It is claimed, that to compel a company to operate a franchise at a loss is confiscatory and contrary to the guarantee of the Federal and State Constitutions. We think, however, that the constitutional provisions in this respect do not apply to contract relations. The 'out of pocket' argument may properly be invoked in a case where obligations are sought to be charged against a company solely by legislative act or executive order. But where a

party enters into a contract the fact that the contract may prove to be a losing one is no defense to its enforcement."

In this opinion Judge Allread, in his usual able manner, stated the principle which has been recognized in every street railway service case in the country. In every municipal street railway case, brought by a city to enforce service and prevent abandonment of a street railway, the court has always recognized the rule that, if the franchise contains mandatory provisions for the operation of cars at certain intervals, and if the term of the franchise is definite, then there can be no abandonment.

There has been a decided difference of opinion where the franchise was for an indeterminate period and was in the form only that permission be and the same is hereby given to operate a street railway on certain streets.

As illustrating this claim let me refer to the leading case of opposing counsel: **(San Antonio Street Railway Company vs. State,** 90 Texas, 520). In the syllabus and opinion the court emphasized the fact that the franchise was merely permissive in form, and that there was no requirement whatever of operation at any time or on any schedule. This judge, in reviewing the case of **City of Potwin Place vs. Topeka R. R. Company,** 51 Kansas, 609, showed very clearly what his opinion would be as to the effect of the very strong provisions of the ordinance involved in our case, by pointing out that the milder provision in the Potwin Place ordinance was sufficient to impose a duty upon the company to operate. The language of the court in commenting upon that case was as follows (page 526):

"The ordinance upon which the company acted, however, contained a requirement that the 'said railway shall be so operated that a car shall pass any given point each way on the route at least every twenty minutes for twelve hours, and at least once every thirty minutes for four hours, during that part of the day the road shall be operated.' **These are the words of command, and may be construed as making it the duty of the company, in case it should construct and operate its road, to continue to operate every part of its line. The opinion, we think, might have been safely placed upon this requirement.** But whether such was or was not the intention of the court, we cannot say from the opinion."

**In the circumstances of this case, the plaintiff cannot cite a single street railway case in support of thier contentions.** By "the circumstances of this case" we mean the very complete provisions of the statutes of Ohio, which clearly grant to the cities complete control over street railways, and clearly show the legislative desire that public obligations be imposed upon the street railroad for a definite term; also and with special emphasis, the very complete and comprehensive scheme of street railway service outlined in these franchise ordinances, including very specific obligations as to the minimum operation schedules, quality of service, care of tracks and equipment, rates of fare and guarantee of expenditure of $1,000,000 in the improvement and maintenance of the system, etc., etc.

In the case of **State ex rel. vs. Bridgeton & M. T. Company,** 62 N. J. L., 592, 45 L. R. A., 837, the street railroad company incorporated under the laws of the state, and the route of its road and location of its tracks established by an ordinance of the municipality and accepted by the company, constructed its tracks in accord-

ance with said ordinance, and afterwards attempted to abandon part of its line, located beyond a certain bridge, because it could not agree with the bridge supervisors as to the manner of operation thereover. The court held that such a company:

> "cannot, at its mere will and discretion, cease and abandon the operation of its line or any portion thereof. It becomes the duty of the railway company in the exercise of its rights, privileges and franchises, for the benefit of the public, to maintain and operate its road according to the terms of the ordinance and in compliance with statutes which confer upon the company such rights, privileges and franchises. (1st branch of Syllabus.)
>
> 2. An implied condition attaches itself to the grant of the franchise, that it be held for public benefit; and the duty upon the railroad company is to exercise it for such purposes; and, as a public agent it cannot escape this duty."

The court held that mandamus was the proper remedy to compel the performance of the duty, and that such duty was imperative until surrendered "by the legally expressed consent of the state."

In the case of State ex rel. v. Spokane Street Ry. Co., 19 Wash., 518, 41 L. R. A., 515, the street railway company had received a general grant of power from the state, and had proceeded to construct and operate a line outside of the municipality with the consent of the property owners, and after the section was annexed to the city, continued to do so without any interference by the city or county. It was held that the company had a public duty which it could not abandon without the consent of the granting power.

In the case of Loader v. Brooklyn Heights Railroad Co., 35 N. Y. Supp., 996, a writ of mandamus was sustained to require a railroad company to operate its cars,

the cessation of operation having been occasioned by the inability of the street railway to get its employes to accept its terms of employment. In this case there is an excellent discussion by Judge Gaynor of the duties of a street railroad company to the public, in which he points out that such a company is:

> "in its chief aspect a public corporation, having obligations to perform to the public, which transcend the obligations which in its private aspect it owes to its stockholders.
>
> * * * They (the directors) are not merely accountable to stockholders. They are accountable to the public first and to their stockholders second. They have duties to the public to perform and they must perform them."

In the case of **Loader v. Atlantic Avenue R. R. Co.**, 35 N. Y. Supp., 999, a similar writ was allowed by Judge Gaynor under somewhat similar circumstances.

In the case of the **City of Potwin Place v. Topeka R. R. Co.**, 51 Kansas, 669, the company had received from the municipality the right to construct a street railroad on certain streets under an ordinance requiring street car service to be furnished by the compnay. The original grantee deeded to the defendant company its franchise, which the defendant accepted and operated under for a time and then attempted to abandon service. A writ of mandamus was allowed. A very clear and strong statement of the duties of such a company is contained in the opinion of the case.

In the case of **Paige v. Schenectady Railroad Company**, 178 N. Y., 102, the facts were somewhat different, but the principle that a street railroad cannot abandon its line after construction without the consent of the state, is very clearly stated. The facts in the case were that the original grantee, after constructing the road,

went into the hands of a receiver. The receiver proceeded to tear up and junk part of the line and sell the balance to an individual, who proceeded to relay the tracks on the abandoned portion. An injunction was brought to prevent this reconstruction, but the court held that the original abandonment was illegal and ineffective because the necessary consent of the state had not been secured; and therefore it was not only the purchaser's right, but his duty to reconstruct the line and operate the road.

In the case of **Thompson et al. v. Schenectady R. R. Co.** (C. C. A.), 131 Fed. Rep., 577, the court expressed very strongly the same view of the duties and obligations of such a corporation. The court in part said:

> "The right to construct and operate a street railway is a franchise granted by the state upon consideration of the public welfare; and any contract which disables the corporation from performing its functions without the consent of the state, and made to relieve the corporation of a burden which it had assumed, is void as against public policy."

In every one of these cases, except the Loader cases decided by Judge Gaynor, the railroad company attempted to abandon all or part of its line for the reason that the same was unprofitable, but the argument of the court in each case shows very clearly that the right of the public is superior to that of the stockholder or bondholder, who invests in the road knowing the contract that has been made with the public for the use of public property.

The case of **New York Trust Co. v. Portsmouth & E. Street Ry. Co.** 192 Fed., 738, was cited in the court below by opposing counsel, but we desire to call the court's attention to the recognition by the court of the superior

right of the public to demand the continued operation of the road. In that case the road had been operated at a serious loss from the beginning; there was no way to operate without continued loss and it was in bad condition and dangerous to operate. This case was in the Federal Court on the ground of diversity of citizenship, and the court decided the only practical solution was to first offer the railroad as a going concern, in order that every opportunity might be given to continue to fulfill the public duty.

Of the three street railroad cases, in which abandonment of the road was permitted by the court, counsel for the plaintiff ventured in the court below cite one only, the Montana case (**Montana ex rel. v. Helena Power & Light Co.**, 44 L. R. A. 692). Although the court in this case quoted from the opinion in the San Antonio case very copiously, opposing counsel for the very good reasons of their own failed to call attention to the San Antonio case, or the case of **Stiles v. Citizens Electric R. R. Co.**, 199 Mass., 394, because, as we believe, the opinions in these two cases point out very clearly and emphasize the difference between the cases where a mere license has been granted, and those cases in which the franchise clearly imposed duties upon the utility companies.

In the Montana case the court emphasized the fact that the ordinance granting the franchise, provided that the right was:

> "Subject to forfeiture for failure to operate it and there is no expressed provision requiring the maintenance or operation of the line." (Syllabus).

And the court further said in the opinion:

> "The ordinances of the city are barren of language expressing or implying the intention of the council to impose such duty (to continue operation). On the contrary, they merely grant the right and privi-

lege of constructing, operating and maintaining railways in particular streets."

In the San Antonio case, 90 Texas, 520, the court emphasized the fact that a mere privilege or license was granted to the company and that no duty to operate was imposed either expressly or by fair implication from the terms of the statute, or otherwise. As stated before, the relevant point of the opinion is contained in the comment on the Potwin Place case.

It has been very interesting to read the other cases cited by opposing counsel upon this point (see pages 35 to 38 of their brief), as it was then apparent how hard pressed they were to find anything in support of their contention.

The case of **Savannah Canal Company v. Shuman,** 91 Ga., 400, involves a canal system which had been permitted to run down, and which the owning corporation declined to operate. Private individuals applied for writ of mandamus, and notwithstanding the defense in the answer to the effect that the company had no funds or any means to obtain same, and if said canal were put in navigable condition it would not be profitable to operate it, the Supreme Court sustained the granting of the writ compelling operation, and observed: "So long as the corporation retains its franchise, the unprofitableness of the same is immaterial; and although want of means may follow as a reason for not inflicting punishment for disobeyance of the writ, it offers no conclusive reason for not ordering the writ to issue."

This case involved a mere permissive charter not for a definite period or term, and not containing any definite provisions as to the operation. So the consolation the

plaintiff takes in the first line of the above quotation is not of interest to this court.

In quoting from the case of **Fellowes v. Los Angeles,** 151 Cal., 52 (page 36 of their brief), they are certainly guilty of a lack of frankness to this court, to say the least. They quote language from page 64 of the opinion to the effect that, "we do not mean to say that a corporation engaged in the distribution of water for public use may not abandon its property" * * *. In the sentence immediately following this quotation the court proceeds to say that it expresses no opinion on the right of abandonment. We quote the sentences immediately following their quotation, which are as follows:

> "In case of a natural person it might become physically impossible. We do not intend to declare that in such case mandatory process could be issued to compel a personal performance of the duty. **These questions are not involved and we express no opinion concerning them.** But in such case, it cannot continue in absolute control of the water-works appropriated to the public service."

We cannot see how there can be any comparison between appellant's contractual obligations in this case and the Los Angeles case, because that was an action to compel the city itself to furnish water from the water system which it had taken over from its former owners, and the court held that it must either continue the public service or return the property to such owners in order that they might render the service.

On page 37 they quote from the opinion in the case of **Northern Pacific v. Washington,** 142 U. S., 492, and permit us to quote the preceding paragraph of the opinion by Mr. Justice Gray:

> "If, as in **Union Pacific R. R. Co. v. Hall,** 91 U. S., 343, the charter of a railroad corporation ex-

pressly requires it to maintain its railroad as a continuous line, it may be compelled to do so by mandamus. So if the charter requires the corporation to construct its road and to run its cars to a certain point on tide water (as was held to be the case in State v. Hartford & N. H. R. Co., 29 Conn., 534), and it has so constructed its road, and used it for years, it may be compelled to continue to do so. And mandamus will lie to compel a corporation to build a bridge in accordance with the express requirements of statute. **N. O. M. & T. R. Co. v. Miss., 112 U. S., 12; People v. Boston & A. R. Co., 70 N. Y., 569.**

## OPERATION AT A LOSS OR POSSIBLE OR PROBABLE BANKRUPTCY DOES NOT RELIEVE THIS PUBLIC UTILITY FROM THE PERFORMANCE OF THESE FRANCHISE CONTRACTS, NOR WARRANT THIS COURT IN PROTECTING THE COMPANY IN THE VIOLATION OF THE CONTRACTS.

In commenting upon the Northern Pacific Railway case, (142 U. S., 492), opposing counsel at page 38 of their brief draw the conclusion that, if the grant is permissive only, then the abandonment of a part of the railroad may be sustained if the operation is carried on at a loss. Therefore permit us to point out in the beginning of this argument that the first complete answer is that these franchise contracts are not permissive grants, but impose specific and definite duties based upon the grant of valuable proprietary interests in the public streets as a consideration. The fact that a valuable consideration was given to the company, not merely a charter with the power to condemn, but the actual gift of valuable property rights, is the second important distinction between this company's case and the cases cited by it.

But first a statement of the alleged financial situation is important, so that we may compare it with the situations presented in the other cases. As stated in the opening statement, allegations in the first bill, eliminated from the second bill after the oral argument in the first case before Judge Westenhaver, justify the conclusion that the company was making a good return on its alleged valuation of $12,000,000 in 1916 in addition to its "proper charge for depreciation". The increase in the coal and labor bills alone in 1917 over 1916 added to the net income for the year 1917-18 after deducting a "proper charge for depreciation," was $537,129.00. This represents 4½% on the principal, without taking into account the difference in other bills and the "proper charge for depreciation," which was either used for dividends or placed aside for future use, in which case it is now available to meet the deficiencies for this lean year. Certainly even this partial showing for the year 1916 when the world war had affected prices considerably, gives some idea of the profits of the fat years.

As to the alleged situation for the year ending June 30, 1918, and for the current year ending June 30, 1919, permit me to review part of the opening statement.

In the first bill it is alleged that the mortgages against the Street Railway part of the company's property amount to $7,295,000 with annual interest charges of $333,000, and in the second bill the amount of bonds so apportioned against the street railway property is $8,600,000 and the annual interest charge $460,000. It is alleged that for the year ending June 30, 1918, the net income, after deducting operating costs, taxes, and a "proper charge for depreciation" is $301,987.00. This was insufficient to pay the interest on the mortgage bonds

by $31,000 under the allegations of the first bill, and by approximately $100,000 under the allegations of the second bill. It is not stated what deduction was made for depreciation, but we may safely assume that their estimate was 5% on the alleged value of the property ($12,000,000), or $600,000. Such depreciation is theoretically a sinking fund for future replacement purposes, so even if we concede that mortgage bonds, issued on the first day of April, 1915 (see paragraph 11 of the second bill) have priority over the claim of the public based on the underlying franchise grants of 1901, there would be a balance of $500,000 in the operating revenues for the year ending June 30, 1918, to stave off the alleged dangers of insolvency. For the year ending June 30, 1919, it anticipated that the operating revenues will be insufficient by $250,000 to meet the operating expenses, taxes and a "proper charge for depreciation." This "proper charge for depreciation," estimated above at $600,000, is more than sufficient to meet the deficiency of $250,000 and the interest charge of $333,000 as stated in the first bill, and is only $50,000 short of enough to pay the interest charge as stated in the second bill. This is not a bad showing for the lean year of the twenty-five year contract, and it emphasizes the elasticity of the "short time" within which bankruptcy is predicted.

By these allegations they virtually claim that the necessity for laying aside a sum for depreciation and of paying the interest on bonds, with which they have encumbered property in various processes of manipulation, is superior to the terms and consideration upon which they hold their entire property right in the streets, and upon which the mortgages are based. It is like saying that a mortgage given in 1915 is superior to a purchase

money mortgage given in 1901, or that a mortgage on a leasehold interest must be paid by the lessee out of the rental due to the lessor. The public's rights are greater than any of these because the company in entering into the franchise contract assumed a duty to the public, which it cannot escape, except through the process followed by every debtor, unable to meet his obligations.

The allegation is that operation at these rates will result in bankruptcy **in a short time.** What do the plaintiffs mean by a short time? It has now outlasted the war and bids fair to outlast war prices. Certainly these claims are not sufficient even to appeal to a chancellor in a suit for specific performance. With these comments upon their allegations as facts we turn now to a discussion of the law pertaining to this subdivision.

Another very important consideration, bearing upon this plea of impossibility of performance because of the possible bankruptcy of the company, is the fact that the company is admittedly doing a very large and extensive power and light business, and the bill is entirely devoid of any allegations showing the amount of profits in such business and their insufficiency to offset the alleged deficits in the railway business. The only possible issue in this case is not that of determining a proper rate for railway service, but is such that the company must show that its entire financial situation is hopeless.

**The first answer to the company's contention is that such a claim has no relevancy in this suit.** This point Judge Westenhaver emphasizes on page 83 of the record in the following words:

> "These statements, it will be noted, apply only to the street railway part of complainant's business. **Furthermore, this is not an application by the city for a mandamus or a mandatory injunction to compel**

continued operation under present conditions nor a suit to compel specific performance of a harsh and unconscionable bargain. Complainant here is seeking an injunction to protect it in a manifest and plain violation of its contract. The rules of law under which courts have refused to compel the operation of an unprofitable railway branch or an unconscionable contract have no pertinency."

This statement of Judge Westenhaver finds support in the opinion of Mr. Justice Strong of this court in **Marble Co. v. Ripley**, 77 U. S., 10, Wall., 339, 19 L. Ed., 955, 960:

"Nor is it any reason for rescinding the contract that it has become more burdensome in its operation upon the complainants than was anticipated. If it be, indeed, unequal now, and if it has become unconscionable, that might possibly be a reason why a court should refuse to decree specific performance; but it has nothing to do with the question why it should be ordered to be cancelled. **It is not the province of a court of equity to undo a bargain because it is hard.**"

The second answer is very aptly stated in Judge Westenhaver's opinion (p. 83):

"On the other hand, if the operation of a railway line cannot be continued owing to insolvency, a court will not, by mandamus or otherwise, try to compel its further operation, and this is particularly true if its continued operation will perform no useful public service. **This refusal of the courts to interfere does not proceed on the view that the company had a right to abandon the operation of an unprofitable system, or of an unprofitable branch. If there is a statutory or contract duty to maintain and operate this obligation still remains in law just as a debtor's obligation to pay his debts remains after he has become insolvent.** But a court will not attempt to compel by mandamus or otherwise that which is manifestly futile and impossible, for a court has no means of providing capital to operate an insolvent railway company or to continue its operation after it has be-

come insolvent. This, it seems to me is all that can be claimed for the statement found in some cases that a court will not compel a continued operation at a loss of a railway line or branch."

Since the company has no right to abandon operation, it has nothing upon which it can base a suit in law or in equity against the City. The company owes this obligation to the City and to the public which it represents and its only appeal can be to the discretion of the chancellor before whom the City applies for the issuance of a mandatory writ. The courts hold that such a chancellor has a discretion in the issuance of such a writ and can refuse the same when to do so would be futile. But in this case the appellants have suffered no legal wrong, for which they are entitled to a remedy. The maxim volenti non fit injuria applies alike to the company and to these appellants claiming under it.

The opinion of Judge Chatfield of the U. S. District Court, Eastern District of New York, in the case of **Gas & Electric Securities Co. vs. Manhattan & Queens Traction Corporation,** involving the petition of the receivers for permission to charge an increase in fare and to increase wages of employes, states the situation in this case exactly. The opinion was handed down on September 9th, 1918, but is not yet reported. The pertinent parts of this opinion are as follows:

> "But if they can disavow the obligation or temporarily postpone operation under it, the court would then have property in its hands which can be operated only within the law. Possession of the property gives the court the right to enjoin any attempt to interfere with that possession or to restrain any illegal exercise of authority. But this court cannot prevent the City from enforcing in a proper tribunal the rights which the receivers are

standing upon as the basis for having anything to receive.

"The receivers cannot treat the right to operate a road as property in their possession, and then ignore or disregard the essential limitations showing of what the property consists. In other words, the receivers have a property right to hold and operate a five cent fare collecting business, with its physical accessories and implements. But the plant cannot be put to another use without the making of a new contract. This court has not the power to force such a new contract on the City, nor to regulate fares upward beyond the limits fixed by the contract creating the right to act at all. The court has not the power to fix the rate at which the City must allow the road to be operated. Simpson et al. v. Shepard, 230 U. S. 352 at 433. Nor can the court proceed to exercise the franchise while holding it unconstitutional.

"There is no vested right to operate a road for public convenience, unless that right be the one which the contract establishes. The court may prevent a breach of contract by the city in reducing rates; it may hold a statute unconstitutional as confiscatory, if a proceeding is brought under Section 266 of the Judicial Code as amended; but it cannot abrogate a contract by holding unconstitutional the law under which the contract was made, and thereupon enlarging the terms of the contract, in order to avoid the consequences of ceasing to act under the contract.

"Nor should the court order its receivers to treat the public unequally by allowing them to collect an excess fare from those passengers who do not refuse to pay.

"The remedy must be sought by application to the City or to the Public Service Commission for a modification of the franchise, if the receivers deem it to the interest of the creditors to continue the franchise rather than to liquidate. The rights and convenience of the public must be looked out for by the receivers and the City from the standpoint of the consequences if the receivers stop operating. But the end will not justify the means so as to give

**the court jurisdiction to prevent the proper authority from deciding what franchise the public should grant for its own welfare.**

"The application must be denied but without thereby preventing or hindering the receivers from seeking any source of relief from the terms of the franchise itself."

There is no escape for the plaintiffs from the logic of these two decisions. As pointed out by both Judge Westenhaver and Judge Chatfield, if Company's situation does become critical without action by the City the only escape for the company is by a receivership and then it will be for the trustee or receiver to ascertain the real facts, and sell the property, or apply to the city for relief in a more frank and sincere manner than this company has heretofore done.

In the case of **Fort Loramie vs. Gress et al.**, (not yet reported) hereinbefore cited, decided by the Ohio Court of Appeals of this district, the First National Bank of New Bremen set forth in its answer and cross-petition a much stronger state of facts in relation to the unprofitable nature of the street railroad business involved, than is set forth in the bill in this case, and in its cross-petition sought an order of the court to permit it to discontinue operation and junk the road. Among the facts were that the road had never been a paying concern, had never produced enough revenue to pay operating expenses and depreciation; that the road had twice been in the hands of receivers because of insolvency, and there was not any reasonable prospect that it ever could pay any return on its value.

We have already stated the facts in this case, showing a provision in the franchises requiring operation of cars at intervals, and have quoted Judge Allread's opinion

holding that the franchise engagements were the material point in the case. As to the claim that forced operation at a loss was confiscatory and in violation of the Fourteenth Amendment, he said:

> "It is claimed, that to compel a company to operate a franchise at a loss is confiscatory and contrary to the guarantee of the Federal and State Constitution. We think, however, that the constitutional provisions in this respect do not apply to contract relations. The 'out of pocket' argument may properly be invoked in a case where obligations are sought to be charged against a company by legislative act or executive order. But where a party enters into a contract the fact that the contract may prove to be a losing one is no defense to its enforcement."

But in this case the company is not seeking to junk the road by removing its tracks, but, as Mr. Clark very aptly expressed it in the lower court in referring to another case, is seeking to "eat its cake and have it, too."

In the case of **Interurban Railway & Terminal Co. et al. vs. City of Cincinnati**, 93 O. S., 108, the court necessarily passed upon the refusal of the Court of Appeals to permit the filing of an amended answer, setting forth the insolvency of the company and the appointment of a receiver, because of the enforcement of the franchise rate of fare. The facts as to such pleading are recited at the bottom of pages 113 and 114. At pages 123 and 124 of the opinion the court emphasized the fact that it cannot relieve the company from a hard bargain and that the allegations of such facts are not a sufficient defense:

> "It is insisted that the enforcement of the terms of the franchise under inquiry here will work hardship and irreparable injury to the company; and cases are cited in support of the accepted proposition that neither the state nor any of its agencies

can, by regulation or legislation, withhold from the owners of the railroad just compensation for its services. But in this case we are dealing with the subject of contract. It implies a meeting of minds. It is much to be regretted if the amount which the interurban company is required to pay to the Cincinnati Company for the use of its tracks is too large a proportion of the fares received, and it is equally to be regretted if the fare provided by the contract itself does not furnish a compensatory return to the company. The presumption is that it was to the interest of the village and to every municipality to provide such a compensation for the services to be rendered by the public utility as will induce the investment of the capital necessary to the furnishing of the service. In fact, it may be said that it is the duty of the municipal and other authorities to provide sufficient compensation. It is equally the duty of the company not to contract to perform a service for less compensation than is proper.

But we are not able to see how the court can alter the terms of the contract in this case as the parties made it. The only thing the court can do is to enforce the contract as it finds it, and to hold that as long as the company continues to operate under the franchise it must submit to the terms thereof. The judgment will be affirmed."

It should be noted that the words "as long as the company continues to operate under the franchise" is accounted for by the fact that the franchise was granted for an indeterminate period, and that no specific duty was imposed as to the manner of operation for any definite period. At the time of this decision the opinion of the Supreme Court in the Northern Ohio Traction case had not been handed down, and under the doctrine of the Akron case, 81 O. S., the Supreme Court of Ohio was of the opinion that a franchise contract for an indeterminate period was revocable at the option of either party.

In the only suits in which this question can be raised, namely, a suit begun for the specific performance of a franchise contract, or for a writ of mandamus, the courts have not refused the writ **where a specific duty to operate existed under charter provisions or under a grant of property rights**, merely because the operation was at a loss.

The only instances in which the writ was refused were where some unusual circumstances were present, such as in the case of **Jack vs. Williams, 113 Fed., 823.** In that case the court pointed out that there was no public demand for the road; that the road had been sold by a receiver and junked; and that the parties who purchased from the receiver had no right to construct or operate a railroad under the laws of North Carolina.

The distinguishing feature of these cases are very clearly pointed out in the very comprehensive opinion of the judge in the case of **Southern Railroad Company vs. Hatchett**, 174 Ky., 43, L. R. A. 1917-D, page 1105, cited with approval by Judge Westenhaver. The discussion and analysis of the cases is thorough and we ask the court's careful consideration. The court's summaries are announced in the following paragraphs:

Page 1109:

> "While some of the cases relied upon by the appellant do, in general terms, announce the doctrine that no railroad corporation will be compelled to operate its trains at a loss, a careful reading of the cases upon the subject will show that the modern general rule is that a company cannot legally abandon its road or a branch, **even though it may be operated at a loss**; and those cases which are apparently in conflict with this rule will be found to have turned upon special circumstances that warrant the decision.

And on page 1112 the following:

> "It of course follows that if a company cannot change the location of its road without the consent of the state, it cannot abandon it. The only seeming exception to the rule (and it is really no exception) is in the case of a bankrupt road, **where there is no one to operate it.**"

And also on page 1111:

> "And here it may be noted that the courts make a distinction in cases of this character and frequently will enjoin the abandonment of a road when they will not, by mandamus, compel a railroad company to relay, rebuild and operate a part of its road which had theretofore been abandoned."

It is unnecessary to analyze appellant's cases in further detail, because in not a single case was the relief of specific performance or mandamus refused when there was a clear charter or franchise duty imposed, as in this case. We refer to the following cases, in which able judges have outlined and enforced the duties of public utilities to the public, and have held that loss in operation, until the time had been reached when there was no one against whom the order could be enforced, was no excuse for non-performance.

Southern Railroad Co. vs. Franklin & P. R. Co., 96 Virginia, 693; 44 L. R. A. 297;
Farmers Loan & T. Co. vs. Henning, Fed. Cases No. 4666;
Talcott vs. Pine Grove Twp., Fed. Cases No. 13735;
Gates vs. Boston & N. Y. Air Line R. Co., 53 Conn. 333, 5 Atl. 695;
Colorado & S. R. Co. vs. State R. Commission, 54 Colo. 64, 129 Pac. 505;
State ex rel. Naylor vs. Dodge City M. & T. Co., 53 Kas., 377, 42 Am. St. Rep. 295;
State vs. Sioux City & P. R. Co., 7 Neb. 357;

Attorney General vs. West Wisconsin R. Co., 36 Wis. 466;
Brownell vs. Old Colony R. Co., 164 Mass. 29, 29 L. R. A. 169;
People vs. Albany & V. R. Co. 24 N. Y. 261.
People ex rel. vs. St. Louis A. & T. H. R. Co., Ill. Sup. Ct., 35 L. R. A. 656.

## NEITHER THE PRESENT HIGH COST OF OPERATION, AN ECONOMIC RESULT OF THE WAR, NOR THE WAGE ARBITRATION BY THE NATIONAL WAR LABOR BOARD, TERMINATES THESE CONTRACTS, NOR ENABLES THE COMPANY TO DO SO.

The affirmative of this proposition is stated by opposing counsel in the following words (p. 48):

> "The situation presented by the war was not within the expectation or contemplation of the parties when the contracts were made, and that as this situation has been created by the war, which is a vis major, the company is justified in claiming that the contracts were not intended to be binding in any such event."

But the most favorable rule they can deduce from any of their cases is that the court, reviewing all the circumstances of the case, must find that no reasonable man would have made such a contract if such a contingency had been contemplated. (See their brief, page 64.)

The solution on the basis of such a rule depends upon the answer to two questions: 1. Was the contingency contemplated at the time of the making of these franfranchise contracts; 2, and, if not, would the companies have accepted the grants if the contingencies had been contemplated?

At the time of the making of these contracts in 1901,

America had entered the field of world politics. The war with Spain began in 1898, and in that year we sent our ships and our men across the Pacific Ocean to invade foreign lands. In the harbor of Manilla we even had a brush with the Germans. All wars of the past had produced a very material effect upon prices. This is a matter of such common knowledge that the court will take notice. Prices were very high during the Civil War, and there is some dispute whether on a percentage basis the increase over pre-existing prices was not as great as during this war. Certainly American conditions were much more disturbed by the Civil War.

In 1901 the idea of a brotherhood or league of nations was not in contemplation, and in fact wars were much more in prospect in those years than they appeared to be in 1914. Certainly when the state legislature authorized, and the parties agreed upon a twenty-five year term, they had in mind the absolute and unconditional settlement of the street car problem in Columbus for that length of time. The agreement is unconditional and each party to the contract took its chances. The great question, as Judge Hollister points out, for the company to decide was as to the cost of operation. The costs of wages and materials with the possibilities of increase, had to be **averaged** over a twenty-five-year period. In 1901 there was certainly no reason to believe that these costs would decrease; in fact, Judge Hollister notes that they were then showing great possibilities.

**Can this court say that the average of these costs over the whole twenty-five-year period have so exceeded the expectation of the parties that no reasonable man would have accepted these contract grants in the year 1901?** Yet that is the appellant's proposition. This is not like

a contract for a short period, which was entered into immediately before the war and which would be much more directly effected by war conditions.

Here, as far as the record shows, the grantees have made handsome profits in the years gone by, and undoubtedly have profited very materially by the great increase in the population of Columbus, amounting to 43% from 1900 to 1910 and at least 30% since 1910.

One thing is absolutely certain, and that is that the grantees would not have received their franchises from the city, if any mental reservation of this sort had been publicly known. As the preamble to the Blanket franchise recites, the price of that grant was to have all the lines, owned or formerly owned by the grantee, operated for a definite period under uniform terms. The city and the company desired to escape the chaos resulting from operation of separate lines under varying franchise terms and to settle the question of the franchises that had expired and were expiring in order to avoid such conditions as have existed in Cleveland and Detroit. No money was required of the company for the use of the streets, and it is apparent the real consideration was the rate of fare, upon the ascertainment of which the interest of all was centered.

If under these circumstances these franchise contracts can be terminated at the option of the company, then there is not a street railway franchise in the country that is worth the paper on which it is written, and every company will then be able to go ahead with its operation free of any restraint whatever, except that that lies in the police power. Not only the rate provisions, but every other provision of these franchises would thereby be cancelled. This court has certainly had enough experience

with street railway problems in cities, where franchises have expired, to know the problems in store for cities in such an event.

Judge Hollister approached the consideration of this question with a doubt in his mind in the company's favor, and he made every allowance in favor of their claim in testing their every case. His conclusions, beginning at the bottom of page 57 of the record, are therefore doubly interesting, as follows:

> "But the circumstances here present a different case. In the preparation for the bidding there were a number of prime factors the company had in mind in determining the rate at which it was willing to carry each passenger. That was based on a number of considerations: The then population of Columbus; the rate of increase in the city's population, as shown by the census, and perhaps by interim statistics; and the cost of operation, including salaries, supplies, and especially wages. The great item of cost of each would be wages, seldom subject to diminution, and having in it even at that time potentialities of tremendous increase. What labor in this country would be demanding during twenty-five years was one of the most important questions to be debated by the promoters of complainant's predecessors .
>
> "On the figure to be paid in wages each year depended the great question of dividends, without at least the hope of which the franchises would not have been sought. Unexpected conditions in the labor market growing out of a war of such character as to have been beyond the anticipation of any one, have thrown the carefully considered plan, which involved revenues greater than cost, out of adjustment; have reversed the contemplated ratio of revenue to cost, and have defeated the plan.
>
> "While the parties did not anticipate the happening of this war, yet the contractor might well have anticipated such rising wages possible during twenty-five years from whatsoever cause, as might wreck the plan and precipitate bankruptcy. As in

the law he would be required to guard himself against the consequences of non-fulfillment by reason of strikes, so here the contractor could have guarded itself against an increase in the cost of labor so great as to prevent his doing what he agreed to do. Contracts for future performance often contain a clause excusing the contractor from performance made impossible by future happenings over which he has no control.

"Of course, the grantee here intended, expected and contracted to operate under the franchise for twenty-five years at the contract rate. Since to do this it was necessary that wages should be always at a figure which made performance possible, it was necessary, in my judgment, for the grantee of these franchises to have guarded against a situation which might happen, namely, the failure of revenue to meet expenses through circumstances unanticipated and over which the grantee had no control.

"This brings into application what was also said by Mr. Justice Matthews in Railway v. Hoyt, 149 U. S., 1, 14, 15:

" 'There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the non-performance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the fault or default of the promisor.'

"If this conclusion is sound, and I think it presents the better argument in the debate, then the doubt must be, and it is, so far as this court is concerned, reserved in favor of the defendants."

In the very recent case of **Knoxville Gas Co. v. Knoxville,** 253 Fed. Reporter, 217, identical allegations were made in the petition to enjoin the city from enforcing a gas rate, which had been fixed in the franchise under which the company operated in Knoxville, and which rate the company claimed had become unremunerative

because of war prices. The court refused the relief sought. The pertinent part of the opinion is as follows: (Page 220.)

"That conditions have radically changed within the last year must be admitted. The war with Germany has brought about a great scarcity of labor on the one hand, and largely increased its cost on the other. The cost of all material entering into the making and distributing of gas has also greatly advanced.

"Under such circumstances, has a court of equity power to relieve a gas company from a contract it voluntarily and understandingly made, and permit it to make another more to its liking, upon the ground that subsequent events have so changed conditions that the contract made by the plaintiff is no longer remunerative? In Blake v. Pine Mountain Iron & Coal Co., 76 Fed., 624, 22 C. C. A., 430, the Circuit Court of Apppeals of the 6th Circuit said:

"It is just these hardships which a court of equity cannot relieve by rescinding contracts, or making new ones by construction, through the process of balancing for non-performance, and going into parol proof of other or different conditions than those expressed in the contracts themselves, intentions relative to failures not anticipated at the time the contracts were made, or not provided for by the terms of the agreements, as they would have been if the parties had not been improvident in neglecting such protection as was open to them against possible failure and change of conditions. The reasonableness of a contract, its fairness and justice, are to be determined as of the time when the parties entered into it, and so of the intentions involved in the construction of their agreements; **and none of these are to be influenced by the force of subsequent changes in events or circumstances.**

"The Blake Case was cited and followed by the Circuit Court of Appeals for the 6th Circuit in Ruggles v. Buckley, 158 Fed., 950, 86 C. C. A., 154. So it would seem to follow that, unless plaintiff can bring itself without that general rule, a court of equity has no power to relieve it, notwithstanding, under

> the new conditions that have arisen, the contract has become a hardship on the plaintiff, and it cannot be performed without loss."

Most of the cases cited by opposing counsel have been considered by Judges Westenhaver (p. 84) and Hollister (p. 57), and as both judges have pointed out their inapplicability to the present case, it seems unnecessary to take up much time in discussing them.

The North German Lloyd v. Guaranty Trust Co., 244 U. S., 12, and Steamship Styria v. Morgan, 186 U. S., page 1, both involve the direct intervention of a war danger and the masters of the particular ships were called upon to exercise, as bailees, the proper degree of care for the safety of their cargoes, as well as of the lives entrusted to their care. Certainly the facts have no relevancy to our case.

The cases of Krell v. Henry, (1903, 2 K. B., 740), and Brenner v. Consumers Metal Co. (41 Ont. L. R., 534), are alike. In the former case throughout the negotiations of the parties the fact was emphasized that the use of the room was desired to view the coronation parade. The advertisement in the window of the lessor's building, which first attracted the lessee's attention, stated the fact that the rooms were to let for the parade only. The opinion shows that parol evidence was admitted for the purpose of identifying the subject matter.

The same is true of Brenner v. Consumers' Metal Co. The contract for the delivery of shrapnel was based upon the correspondence between the parties, and in his letters the manufacturer emphasized the fact that he could make deliveries only as fast as he could secure cars for shipment. The court held that a conditional contract was thus made, and "that it was an implied term of the

contract that unless shipping facilities should be available within a reasonable time the obligation of the company to deliver would be at an end."

In relation to the case of Tampa Steamship Company, Appeal Cases 1916, Vol. 2, 397, opposing counsel quote from the opinion of one of the dissenting judges. We wish to call attention to the fact that the majority of the court held that the charter party of the vessel for five years was not terminated by the requisition of the vessel by the admiralty, and the charterers could still claim the vessel and the compensation. In several other cases, notably Liston v. Owners of Steamship Carpathian, the question of seamen's contracts was involved. Great additional hazards to life and liberty had arisen because of the dangers from German war vessels and submarines, and the court following the general humanitarian rule held the contract terminated by this **direct intervention** of war. If the court had held this contract terminated, because of the increased cost of living, there might have been some similarity.

Judge Westenhaver's conclusions after reviewing these decisions were as follows: (Page 84 of the opinion.)

> "No such conditions are herepresent. The performance of these franchise contracts has not been made illegal nor rendered impossible by any superior power. War conditions, it is true, have made the performance of them only more burdensome and expensive, so far as the facts now presented tend to show. The war has in a different degree perhaps affected the performance of many, if not the larger part of outstanding and unexecuted contracts between citizens of the United States, yet it would be a strong proposition to say that all such contracts are thereby rendered void or voidable at the option of the losing party.

"The increased cost to complainant of performing its franchise contracts differs only in degree and quality from that due to other economic causes prevailing since they were made. If the war or economic changes had decreased the price of coal, materials, supplies and labor, it would not be urged upon any one that the city would have the right to declare null and void these contracts or the fare provisions therein, and establish a new rate in accordance with new conditions; and if the city should take such a position it would be met, and justly, with a complaint that such action is impairing the obligation of a valid and binding contract.

"In order to make applicable the principles of law urged in this connection, it would be necessary to show that war or military authority had directly interfered in such a manner as to make these contracts illegal or impossible of performance. Nothing less than the equivalent of actual seizure by military authority, or a direct and forcible intervention to prevent further performance would bring the case within the operation of these rules."

Great stress is placed on the award of the War Labor Board increasing the wages of the employees of the appellant company. But the bills disclose that the employees of the appellant company inaugurated a strike for higher wages; it was agreed between the appellant company and its employees that it should be submitted to the arbitration of the War Labor Board. There was no legal compulsion on the appellant company to submit it to arbitration.

It is the duty of every public utility to pay a living wage, and it is also the duty of the company to man its cars whether or not it can agree with the men on the amount of wages or not. The company cannot stand on its own idea of wages and refuse to give service as Judge Gaynor pointed out in the case of **Loader v. Brooklyn Heights R. R. Co.**, 35 N. Y. Supp., 996, and **Loader v.**

**Atlantic Avenue R. R. Co.**, 35 N. Y. Supp., 999. The essential thing is that the company must give service and must pay whatever wages are necessary to get the men to man its cars. That is the exact situation here. The company could not agree with its men, and the matter was therefore referred for arbitration by the voluntary action of the parties. The finding of the War Labor Board was just as binding upon the company as any other arbitration would have been, and no more so.

President Wilson, by proclamation, defined the powers and functions of the War Labor Board. First, he said: (From the bulletin published by National War Labor Board.)

> "And I do hereby urge upon all employers and employees within the United States the necessity of utilizing the means and methods thus provided for the adjustment of all industrial disputes, and request that during the pendency of mediation or arbitration through the said means and methods, there shall be no discontinuance of industrial operations which would result in curtailment of the production of war necessities."

This makes it manifest that the board had no power to compel either employers or employees to arbitrate.

Next, the functions of the board are, by the proclamation more specifically defined thus:

> "To bring about a settlement, by mediation and conciliation, of every controversy arising between employers and workers in the field of production necessary for the effective conduct of the war."

This makes it plain that the board could not increase the wages of the employees, unless employers and employees had submitted their controversy to the arbitrament of the board.

Of course, after the parties had so submitted their dis-

pute and the board had made an award, the award was compulsory, just as it would have been, but no more so, if they had submitted the dispute to John Smith and John Jones as arbitrators.

The bills of the appellants show, expressly, that the appellant company and its employees voluntarily submitted their disputed questions to the board.

But this is not all. The bills utterly fail to show that the fulfillment of these contracts will be rendered impossible by the company by any act of public authority. The European War did not do this.

War between two nations never affects the contracts between citizens of one of the belligerents. It only suspends the enforcement of contracts between parties who are citizens of both belligerents. As soon as the war ends, they can be enforced.

There is still more to be said. By paragraph (C) of the Act of Congress of June 15, 1917 (Advance Sheets of Federal Reporter, May 23, 1918, page 119), the President is empowered "to take possession, lease or assume control of, any street railroad, interurban railroad, or part thereof, cars and other equipment necessary to operation." Before Judge Westenhaver, this was cited by opposite counsel but why we did not learn. Whenever the President chooses to exert the power there conferred, he may change the rates of fare. That is, he could do that if he should take control of all street railroads. Manifestly, he would not exercise the power in the instance of the street railroad of one city.

This seems to be the view of ex-President Taft, one of the Chairmen of the War Labor Board, who said:

> "I think it is very doubtful whether the President has, under the law, the right to alter or regulate the affairs of street railways within the states. Counsel

before us claimed that the legislation now existing was sufficient, but on a closer examination, I am inclined to think that, while undoubtedly he might take over the street railways of the country and run them as necessary to war work and war production, and taking them over he might fix the rates of fare to the public as he would choose, I don't think that the right to fix fares or increase them is included within the right to take over public utilities and then charge such rates as he may approve to the public."

He added that Congress could, in the exercise of its war power, endow the President with power to increase the fares on street railways in particular cases, and that he had advised the President to ask Congress for further legislation of that character; but the latter never asked for it.

We respectfully submit that Judge Westenhaver stated the law exactly as it is when he said:

> "In order to make applicable the principles of law urged in this connection, it would be necessary to show that war or military authority had directly interfered in such a manner as to make these contracts illegal or impossible of performance. Nothing less than the equivalent of actual seizure by military authority, or a direct and forcible intervention to prevent further performance would bring the case within the operation of these rules."

## NO SURRENDER NOR ABROGATION OF THESE CONTRACTS HAS BEEN EFFECTED.

Our first contention under this heading is that there can be no surrender or cancellation of these franchise contracts **without the consent of the city,** by reason of the propositions already well established, we believe, in the preceding sections of this brief, namely, that the contracts were valid and binding when made and, not

being permissive in form but imposing specific duties of operation upon the grantee during the entire term, are binding upon both parties for the twenty-five year period. The company's letter of surrender, therefore, accomplished nothing.

Our second proposition is, assuming for the purpose of the argument that the franchises are permissive and could be terminated at the will of the grantees, with or without cause or because of an implied condition, that there has been no surrender or abrogation of the franchises effected by the action of the Company on August 20, 1918, or thereafter.

We base this contention on two grounds:

(1) The consents of the mortgage trustees, who represent large investments based on the franchise rights, have not been secured, nor have said trustees been made parties to this suit, or otherwise notified of the procedure of the appellant company; and

(2) The verbal destruction of the franchises is ineffective to relieve the appellants from the obligations thereof, for they still continue to enjoy the privileges received at the time of the acceptance of these grants by continuing operation and maintaining their structures in the streets.

The petition in the second case shows that the Girard Trust Company, residence and place of incorporation not stated, is the trustee in the first mortgage on the properties of this company, and that the appellants in the second case own $200,000.00 of the bond protected by that mortgage. The bill in the first case shows that the mortgage bonds against the street railroad property alone in the hands of bona fide holders amount to $7,295,000, and in the second case these figures are in-

creased to $8,600,000. The Girard Trust Company is only referred to in the second petition, and was not made a party, nor was any consent received from it, or notice given to it in relation to the procedure adopted by the appellant company in notifying the city council of Columbus that on August 20 it surrendered its franchises. Other mortgagees, or mortgage trustees, are not even referred to in either of the bills.

This presents an unusual situation indeed. It is a matter of very common knowledge that a very large percentage of any street railway company's investment is in the streets, consisting of tracks, or track substructure, and the paving which the companies are generally required to lay between the tracks. It is to be noted, too, that the blanket franchise (Sec. 23, page 21 of Record No. 715), provides:

> "Sec. 23. Upon the expiration of the term of the renewal franchise herein granted said company shall, unless a further renewal be granted by said city, remove all its tracks, rails, and other appliances from the streets and avenues of said city, and leave the portion of each and every street occupied by its lines in good condition, corresponding in finish and material with the remainder of such streets and avenues."

Can it be that the appellant company can by a mere letter, without any consent or waiver from the mortgagees, destroy absolutely every dollar of value represented by the amounts of the various mortgages? There is no doubt but the value of the rails and poles, after their removal from the streets, would be less than the cost of replacing the streets in good condition, corresponding in finish and material with the remainder. Our contention is that the mortgages cannot be acrificed in that manner.

We base this contention upon the case of **The Old Colony Trust Co. v. City of Omaha**, 230 U. S., p. 100, 57 L. Ed., 1410. In this case the city had denied the validity of a claimed franchise for the distribution of electric current for heating and power as well as for lighting. The light company was unsuccessful in maintaining its claim, but the Old Colony Trust Company, the trustee in the mortgage on the lighting company's property, was not made a party in that case, and subsequently filed a suit. The following portions of the syllabus and of the opinion state very clearly this court's opinion of the rights of such a trustee, as follows:

Syllabus:

> "4. A decree against the electric light and power company in a controversy with the municipality over its franchise does not prevent the trustee in the mortgage given by said company from maintaining a similar suit against the municipality, where the trustee's rights and those of the bondholders whom it represents were acquired long prior to the first suit, and the trustee was not a party to that suit."

Opinion, page 122:

> "In other words, the trust company is entitled to insist upon a recognition and continuation, subject to all the qualifications inhering in the franchise, of all the rights conferred by the franchise ordinance as the same was interpreted in actual practice by the electric company and the city prior to the resolution of 1908. But neither the trust company nor the electric company is entitled to make that construction a basis for enlarging or extending those rights, against the will of the city, or for enlarging or extending the purposes for which electric current may, through the use of the streets, be transmitted and supplied under the protection of the franchise.
>
> A prior suit by the electric company against the city, largely but not entirely like the present, re-

sulted in a decree against the electric company. The city now takes the position that that decree is conclusive upon the trust company as mortgagee. But the law is otherwise. The Trust Company's rights, and those of the bondholders whom it represents, were not acquired during or since that suit, but long prior thereto and the Trust Company was not a party to it. This being so, the Trust Company is free to maintain the present suit, unembarrassed by the decree in the other. **Keokuk & W. R. Co. v. Missouri**, 152 U. S., 301, 313; 38 L. ed., 450, 455; **Louisville Trust Co. v. Cincinnati**, 22 C. C. A., 334, 76 Fed., 296."

The principles thus clearly enunciated leave no room for doubt. The company's invitation to the city to put it off the streets, amounts to nothing. It is mere bluff, intended merely to give it the opportunity to hold the people of Columbus by the throat, while it dragged out of their pockets a 65% increase in single rides, and a 95% increasee in double or transfer rides. The company deserves the censure of this court for seeking Federal aid in its nefarious proceeding.

In addition to the fact that there has been no notice to or consent by the trustee, it is to be noted, also, that the company has continued the operation of all the franchise lines. It may be possible that failure to operate would effectively bind the mortgagee, but certainly when the company continues the operation of its cars and lines for public service, the fact that it demands a greater fare will not work a forfeiture as against the mortgage trustee. The city has, or is supposed to have, its remedy in the state courts for such a violation of the contract.

For **our second proposition** upon the argumentative assumption that the franchise is permissive, is that the verbal or written announcement that the franchise has

been surrendered to council does not effect that result without a complete withdrawal of the property from its dedication to the franchise use. When a franchise is granted by a city, accepted by a public utility company, and the streets of the city and the property of the company together dedicated to a public use, a public institution has been created.

When the franchise is for a definite period, that period marks the time that the owner is required to continue the dedication of his property to the public use. He can then discontinue the dedication, but as long as he continues to enjoy the benefit of such a grant, namely, the use of valuable property rights in the streets, he cannot deny the binding effect of the instrument which created and is an inseparable part of his rights and privileges.

It has been established by the opinion of this court in the case of Detroit Union Railway Co. vs. City of Detroit, that at the expiration of a franchise for a definite period a street railway company

> "has no implied contract right to remain in the streets under such reasonable arrangements for public service as the situation may require, which would be impaired, contrary to the U. S. Constitution, Article 1, Section 10;" nor is its property "taken without due process of law by requiring it to remove its tracks and other property from the streets within a reasonable time." (2nd and 3rd branches of the syllabus.)

Under the terms of Section 23 of the Blanket Franchise, above quoted, the company is required upon the expiration of the term of the franchise and "to remove all its tracks, rails and other appliances from the streets and avenues of said city," and to replace the streets in

good condition, **"unless a further renewal be granted by said city."**

If the appellants claim under this provision the burden falls upon the appellants in this case to show cause for the continuance of their tracks in the streets, and they can only do this by showing that council agreed to give them a new franchise. But the whole burden of their complaint is that the city insists upon the old franchise and its terms. **The continuance of their tracks in the streets is entirely inconsistent with the surrender of the franchise, because of the provisions for removal above quoted.**

In the case of Mumm vs. Illinois, 94 U. S., 113, 126, Chief Justice Waite defined the effect upon private property of its dedication to public service and then said: (Page 126.)

> "He may withdraw his grant by discontinuing the use; **but so long as he maintains the use he must submit to the control."**

In this case the terms of the control are established by the contract of the parties, and until that contract expires, or until the dedication of the property is discontinued by the owner under the provisions of law, those terms must control.

The statement of this proposition is emphasized in the opinion of Judge Chatfield in the Manhattan & Queen's Traction Company case, quoted at length in a prior subdivision of this brief.

The appellant company is the lessee of certain streets of Columbus for street railway purposes. Its position is exactly analogous to any other lessee of property. Would the lessee of ground for a twenty-five year term, who had placed buildings thereon, be permitted to es-

cape judgment for the full amount of his agreed rental in the absence of any default on the part of the lessor, under the state of facts relied on by these appellants? All he would have to do would be to notify the lessor that, owing to the high prices resulting fro mthe war, the rent was too high to enable him to make a profit and the lease was therefore at an end, but that he would remain in possession and maintain his buildings upon the premises until he was removed by the lessor. Certain he could not escape judgment for the agreed rental during the time that he remained in position. The company is now in full possession and enjoyment of the streets of Columbus, and cannot escape judgment by any such subterfuge.

Do opposing counsel mean to say that the Interstate Consolidated Street Railway Company could have escaped the judgment of this court, as announced in 207 U. S., p. 79, by notifying the state that it surrendered its charter, but would continue to enjoy all the privileges of that charter? Surely counsel's plan would have been a very simple one for the Interurban Railway & Terminal Co., which endeavored in the courts of the state, and by application to the Utilities Commission, to continue the enjoyment of its franchise rights without paying the franchise consideration (93 O. S., 108; 98 O. S., 320). Surely counsel misconceive the nature of a franchise. We deny that the law is capable of such an absurdity.

## DUE PROCESS OF LAW.

In the opposite brief, it is argued that the enforcement of the rates of fare which were agreed upon between the parties to these two ordinances would be a violation of the due process of law provision of the Fourteenth Amendment. Upon the admitted facts in these causes, that is a legal impossibility.

(1) There can be no violation of this constitutional guarantee, unless it is averred in the bill that the act violating it was committed by the state or some department or officer of the state. This is made clear by a decision of this court, wherein Justice Bradley said:

> "But under that, or any other law, it must appear as well by allegation, as proof at the trial, that the Constitution had been violated by the action of the State legislature. Some obnoxious State law passed, or that might be passed, is necessary to be assumed in order to lay the foundation of any federal remedy in the case; and for the very sufficient reason, that the constitutional prohibition is against **State laws** impairing the obligation of contracts.
>
> And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under such amendment, nor any **proceeding** under such legislation, can be called into activity; for the prohibitions of the amendent are against State laws and acts done under State authority."
>
> **Civil Rights Cases,** 109 U. S., 3, at 12 and 13.

(2) The state can only act by legislation; the city can only act by ordinance or resolution or motion.

(3) In the case at bar, such legislation, ordinance, resolution or motion would have to affect these contracts.

(4) They would have to deprive the company of some of its property without due process of law.

(5) But there is not a syllable of allegation in the bills that either the state legislature enacted a law, or that the city adopted or will adopt an ordinance, resolution or motion which affected these contracts or either of them. **The absence of such an averment is enough in itself to require the dismissal of this case.**

(6) The enforcement of the rates of fare by the city would not deprive the appellants or either of them of their property, because their predecessors in title, the companies to which the franchise grants were made, made contracts with the city which fixed the rates of fare. The statutes of Ohio which authorize or commanded these contracts to be made were decided by this court to be valid exercises of legislative power; the contracts were made in obedience to the authority and command of those statutes. Whatever is valid, whatever is done in obedience to law, is inherently due process of law. Due process of law is of its very essence. That to which a party to a contract consents does not lack due process of law. Any proceeding which the city should adopt to enforce these contracts would be in harmony with due process of law. It would be legally impossible to affirm that such a proceeding would lack due process of law.

If neither the legislature nor the city could lay its lawless hands upon these contracts, as this court decided in the Cleveland case, so has neither of the appellants any right to trample upon them with their lawless feet. The appellant company treated these contracts just as if they were mere "scraps of paper," just as the Kaiser treated the treaty with Belgium. This country sent

about two million soldiers over to France and Belgium, and they shed their blood there in order to shoot to death the immoral doctrine that justifies the violation of a contract treaty.

We affirm that no case can be found in which it was decided that the Fourteenth Amendment applied to a case where rates of fare were fixed by contracts by parties to the contract. Nor has any court ever decided that rates of fare fixed by the contract of parties violated the due process of law provision of the Fourteenth Amendment.

The bills here show affirmatively that neither the state nor the city has done anything to violate the contracts, and by positive averment, they show that the city is not intending to do any such act in the future.

In **Lowe v. Kansas**, 163 U. S., 81, 16 Sup. Ct. Rep., 1031, Justice Gray said the question for the court to decide was "whether this enactment, as applied by the Supreme Court of Kansas to this case, contravenes the Fourteenth Amendment of the Constitution of the United States, by depriving Lowe of his liberty or property without due process of law, or by denying him the equal protection of the laws." And then he added:

> "Whether the mode of proceedings prescribed by this statute, and followed in this case, was due process of law, depends upon the question whether it was in substantial accord with the law and usage in England before the Declaration of Independence, and in this country since it became a nation, in similar cases." (Page 1033.)

In the cases at bar, the contracts are not only in substantial accord with the law, they are in complete accord with it.

In Hurtado v. California, 110 U. S., 516, at 535, due

process of law in the Fourteenth Amendment was thus defined:

> "In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws; and alter them at their pleasure."

Justice Field defined this phrase in Dent v. West Virginia, 129 U. S., 114.

We also cite Bannon's Fourteenth Amendment, 142, 143, and Guthrie's Fourteenth Amendment, 70, on the question discussed.

We have already quoted at length from the opinion of the Supreme Court of Ohio in the case of the **Interurban Railway & Terminal Company v. Cincinnati,** 93 O. S., 108, **a proceeding by the City of Cincinnati** to enforce a franchise rate of five cents from what was formerly the Village of Pleasant Ridge to the terminal in Cincinnati. In order that the court may see the issue in that case as made by the company's answer, we quote from pages 112 and 113 of the opinion as follows:

> "Defendant says that said provision is unreasonable, that a fare of five cents from the corporation line of the village of Pleasant Ridge to the Cincinnati terminus, three cents of which the defendant is required to pay to The Cincinnati Traction Company, **will not be sufficient to produce an income to pay operating expenses of this defendant and will destroy its existence.**" (Pages 112, 113.)

In the Court of Appeals, the company asked leave to file an amendment to its answer,

"**alleging the ordinance was unfair, unreasonable**

**and confiscatory; that the two cent net fare for the district involved did not produce sufficient income to pay the operating expense of the company, would destroy its existence and prevent it from operating any cars whatever on the line, and had already, since the execution of the decree of the common pleas court, been largely instrumental in forcing the company into the hands of receivers, who now have charge of the property. It was further alleged that the property was thereby confiscated and rendered valueless and taken without due process of law, contrary to the provisions of both federal and state constitutions.**

The court of appeals refused leave to file this amended answer, and on the final hearing of the case found the issues in favor of the plaintiff and likewise entered a decree enjoining the defendants as prayed for in the petition."

By refusing to allow the amendment, the Court of Appeals decided that it did not constitute a defense, or, to be more concrete, that it was not a sufficient defense, that the rate of fare was confiscatory, that it would "destroy its existence", that the decision of the Common Pleas Court enjoining the company from increasing its fare above that fixed by the contract had forced the company into the hands of a receiver, and had rendered its property valueless and had confiscated it, and taken it without due process of law. And the Supreme Court affirmed that determination of the Court of Appeals.

As stated before, the appellants' entire **right** of action is based on the due process clause of the Fourteenth Amendment. They seem to think there is some magic in this clause which **creates** a right for them, not seeming to realize that the Fourteenth Amendment is not the creator, but the protector of rights already existing.

If the right of the city to proceed by due process of law to ask the specific performance of these contracts were a real issue here, the question is finally and conclu-

sively settled by the decision of the court in the case of **Interstate Consolidated Street Railway Co. v. Massachusetts,** 207 U. S., 79. This case has been several times quoted in this brief, and it is sufficient to say here that the clear holding in that case, as well as of Ashley v. Ryan, 153 U. S., 436, 443, and of Wight v. Davidson, 181 U. S., 371, 377, is that the acceptance of a charter by a corporation estops it from contesting the validity or constitutionality of the obligations imposed as considerations for the charter. The case here is much stronger in that the company received valuable proprietary rights in consideration for its agreements. These appellants cannot now deny the reasonableness or binding effect of the rates which they offered as a consideration for the grants.

It is futile to cite such a case as Castle v. Mason, 91 O. S., 296, in which the Ohio Supreme Court held that the reasonableness of a statute fixing fees for oil inspection could be determined by its operative effect. This statute was a police measure strictly, and the fees were not agreed to by the parties upon whom they were imposed, nor was there any grant of property rights as a consideration for the fees, which the party intended to hold while denying the validity of the fees.

In other words, for the franchise contracts to constitute such an action by the state or its agency as would justify the invocation of the due process clause, there must have been a pre-existing right. Such a right these appellants did not have. They had no right in the streets except under these franchise grants, and they dedicated their property to public use under the protection and subject to all the obligations of these contracts. The rights created by the contracts were defined and re-

stricted by the mutual covenants and agreements of the parties; so also as to rights in the property dedicated to public use under these franchises.

N. & W. Ry. Co. v. Conley, 236 U. S., 605, is not in point, because the West Virginia two-cent law was purely an exercise of the governmental rate-making power. While the company submitted to a test of the law for two years, it at no time accepted the law. Nor could any binding acceptance be implied, because the company was in existence at the time the act was passed, and received no consideration for submitting to the operation of the law.

**Likewise, the company's argument, that the profit it is making in the light and power departments of the business has no bearing on this question, is invalid.** In other words, since their sole appeal has been one which should be made to the chancellor, who has been petitioned for the specific performance of the contract, on the ground that performance was rendered impossible by the bankrupty of the company, all the assets of the company must be considered in determining the validity of the plea.

We submit that the following decisions, hereinbefore quoted at length, conclusively prove that appellants have not made a case within the scope of the Fourteenth Amendment:

Interstate Consolidated Street Ry. Co. v. Massachusetts, 207 U. S., 79;
Detroit United Ry. Co. v. City of Detroit, 229 U. S., 39;
Cleveland v. Cleveland City Ry. Co., 194 U. S., 517;
City Ry. Co. v. Citizens Street Ry. Co., 166 U. S., 557;
Interurban Co. v. Cincinnati, 93 O. S., 108;
Interurban Co. v. Public Utilities Commission, 98 O. S., 287;

Cincinnati v. Public Utilities Commission, 98 O. S., 320;
Ft. Loramie v. Gress, O. C. A., not yet reported, July 9, 1918;
Knoxville Gas Co. v. Knoxville, 253 Fed., 217;
Gas & Electric Securities Co. v. Manhattan & Queens Traction Corp., Application of Receivers, Sept. 9, 1918, U. S. District Court, Eastern Div. N. Y.

## SUMMARY.

In supporting the decisions of the lower courts, sustaining the motions of the city to dismiss these causes, we rely upon three propositions, as follows:

1. The franchise contracts are valid and binding upon both parties for the entire term of twenty-five years each, and, containing agreements on the part of the grantees to operate at the fixed rate of fares during said entire periods, cannot be abandoned by the grantees, their successors and assigns, **without the consent of the city.**

2. If the franchises were merely permissive and gave the grantees the right to surrender at their pleasure, or could be surrendered because of implied conditions, **no cancellation has been effected** by the company's action cause, (a) the consent of the mortgage trustee has not been secured, and (b) the verbal surrender of the franchises is ineffective to relieve the appellants from the obligations thereof while they still maintain their structures in the streets and enjoy all the privileges of operation conferred by the franchises.

3. If cancellation has been legally effected, the appellants have not been deprived of any rights by the City of Columbus, or by any of the other appellees, have not

been deprived of any rights under the Fourteenth Amendment, and have entirely failed to show a right of action in this court.

Appellees therefore respectfully submit that the decrees in the above entitled cases should be sustained.

HENRY L. SCARLETT,
City Attorney of Columbus, Ohio,
Solicitor for Appellees,

DAVID F. PUGH,
Of Counsel.

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JAMES D. MA

NO. 715

OCTOBER TERM, 1918

IN THE

# Supreme Court of the United States

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THE COLUMBUS RAILWAY, POWER AND LIGHT COMPANY

*Plaintiff and Appellant*

VS.

CITY OF COLUMBUS, *et al.*

*Defendants and Appellees*

---

## Motion and Petition to Advance

KARL E. BURR
JOSEPH S. CLARK
HENRY J. BOOTH
W. O. HENDERSON
*Attorneys and Counsel for Petitioner*

IN THE

# Supreme Court of the United States

October Term, 1918. No. 715

THE COLUMBUS RAILWAY POWER AND LIGHT COMPANY

*Plaintiff and Appellant*

vs.

CITY OF COLUMBUS, ET AL.

*Defendants and Appellees*

## MOTION TO ADVANCE CASE

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Now comes The Columbus Railway, Power and Light Company, a corporation of the State of Ohio, and moves that the above entitled case be advanced upon the docket of this Court.

Your petitioner respectfully represents that the following is a brief statement of the matter involved, to wit:

Your petitioner owns and operates a system of street railway lines in the City of Columbus, Ohio, and until August 20, 1918, operated said railway lines under two certain franchise grants issued by the City of Columbus to predecessor railway companies, which franchise grants specified the rates of fare to be charged. These rates of fare were reasonable when the grants were issued and accepted, but have become unreasonable and confiscatory by recent very great increases in costs of operation, including partic-

ularly the costs of all labor and supplies, due primarily to the present war. These franchise grants require your petitioner to issue eight tickets for twenty-five cents and to give universal free transfers with the result that your petitioner receives an average of 2.6 cents for a car ride, counting a ride on a transfer as a separate ride. On August 20, 1918, your petitioner, having theretofore made various unsuccessful efforts to secure from the City the right to charge higher rates of fare, addressed a written communication to the City setting forth the facts, and stating particularly that the rates of fare had become confiscatory and by said written statement your petitioner surrendered, cancelled and abandoned these franchise grants and has since said date been a tenant at sufferance upon the streets except for certain perpetual franchise rights which may be disregarded in the present case, and your petitioner has since said date been giving street railway facilities to the people of the City of Columbus at an increased fare of five cents for a car ride and one cent for a transfer. Immediately after delivering said written communication to the city your petitioner instituted this suit in the United States District Court for the Southern District of Ohio by filing the bill herein asking for an injunction to restrain the city from enforcing said franchise grants, and particularly the confiscatory rates of fare therein specified.

Your petitioner further represents that its reasons for this application are that this case presents certain questions of great interest and importance at the present time because of the fact that so many street railway companies throughout the country are embarrassed financially and either operating at a loss or unable to pay their fixed charges, this result being due to the very great increases in operating expenses caused by the war, such increases amounting to 100%, 200% and sometimes 300% in certain items; and such companies are unable to secure the consent of the local authorities to make any reasonable increases in their rates of fare and cannot increase their rates without violating

franchise conditions. The questions presented in this case may be properly stated as follows:

1. Does a municipal franchise grant to a street railway company, issued in the year 1901 under the laws of the State of Ohio for a term of twenty-five years with specified rates of fare, reasonable when the grant was issued and accepted, but which have become unreasonable and confiscatory by reason of great increases in the cost of operations, bind the street railway company to continue operating its railway lines at a loss under said rates of fare for the balance of the term of twenty-five years, or until said company becomes insolvent and unable to continue its operations under said grant, provided said company has surrendered or attempted to surrender said grant to the city by written instrument addressed and delivered to the proper authorities of the city?

2. Are the rates of fare specified in said grant prescribed rates or agreed rates? *Milwaukee Electric R. & L. Co. vs. Railroad Commission*, 238 U. S. 174.

3. Is not the 14th Amendment a complete protection to the street railway company against the enforcement of such confiscatory rates of fare even if such rates are agreed rates and, if not, then is not the 14th Amendment a complete protection, provided said rates are prescribed rates?

4. The great increases in operating expenses of the Railway Company, being directly due to the war and the developments presenting a situation not within the contemplation and expectation of the city or the railway company when the grant was issued and accepted, is not the court justified and required to imply a condition in the grant that such obligations as it imposes were not intended by the parties to continue or to be enforced in the unexpected emergency which has arisen? *Guaranty Trust Co. vs. North German Lloyd Co.*, 244 U. S. 12; *Metropolitan*

*Water Board vs. Dick Kerr & Co.* (1918) Appeal Cases (Eng.) 119 House of Lords, Nov. 26, 1917.

5. Does not an award of the War Labor Board, appointed by the President of the United States under the authority conferred upon him by Act of Congress, which award increases the wages paid by the Railway Company annually over 50%, making an annual increased wage payment of $560,000, which causes the company to operate at a loss, present a situation which justifies and requires the court to imply such a condition in the franchise grant?

6. Will a court of equity enforce specific performance of a franchise grant with specified rates of fare which, although reasonable at the time the grant was issued and accepted, have become confiscatory by changed conditions?

Your petitioner further represents that the President of the United States was authorized by the Act of Congress entitled "An Act Making Appropriations For the Support of the Army For the Fiscal Year Ending June 30th, 1917, and For Other Purposes (Acts of 64th Congress, Chapter 418, U. S. Statutes at Large, Vol. 39, Part 1, Public Laws pages 619, 645)" to take possession and assume control of the transportation systems of the country. The President acted under the authority conferred by this statute by proclamation dated December 26, 1917, and took possession and assumed control of the steam railway lines of the country, stating in said proclamation that nothing therein stated should affect the possession, operation and control of street electric passenger railways and interurban railways, but that if it should be found necessary or desirable later he would take possession and assume control of these street and interurban properties.

Your petitioner further represents that a great many of the street railway companies of the country have requested the President of the United States to exercise the power conferred upon him by Congress and to take them

over and operate them because of the very embarrassing situation financially in which they find themselves, due to the great increases in operating expenses caused by the war, but he has not as yet taken favorable action upon any of these requests.

KARL E. BURR
JOSEPH S. CLARK
HENRY J. BOOTH
W. O. HENDERSON
*Attorneys and Counsel for Petitioner*

STATE OF PENNSYLVANIA )
COUNTY OF PHILADELPHIA ) *ss:*

being duly sworn according to law, deposes and says that he is of The Columbus Railway, Power and Light Company, plaintiff and appellant in the above mentioned cause; that he has read the foregoing motion and petition, and that the facts therein set forth are true and correct.

Sworn to and subscribed before
me this day of October,
1918.

*Notary Public*

# SUPREME COURT OF THE UNITED STATES.

No. 715—October Term, 1919.

| | |
|---|---|
| The Columbus Railway, Power & Light Company, Appellant, *vs.* The City of Columbus, Ohio, et al. | Appeal from the District Court of the United States for the Southern District of Ohio. |

[April 14, 1919.]

Mr. Justice Day delivered the opinion of the Court.

The Columbus Railway, Power & Light Company filed its complaint and amended bill of complaint in the District Court of the United States for the Southern District of Ohio against the city of Columbus, Ohio, and officials and members of the City Council of the city, asking an injunction against the enforcement of ordinances concerning the operation of street railways upon certain streets in the city of Columbus. Upon motions to dismiss, and for a temporary injunction, the District Court held that there was no jurisdiction as the amended bill of complaint presented no substantial federal question, and, considering the case upon its merits, held that the amended bill did not state facts constituting a valid cause of action in equity against the defendant, and dismissed the same. An appeal was prosecuted to this court; the case has been argued and submitted.

The amended bill of complaint alleges in substance that the Company and its predecessors have since the enactment of two ordinances, hereinafter mentioned, and until the 20th of August, 1918, operated a system of street railway lines in the city of Columbus. The two ordinances in question are referred to in the bill and attached thereto. The one, denominated the Blanket Franchise Ordinance was passed February 4, 1901, and the other, called the Central Market Franchise Ordinance, was passed January 1, 1901. The allegations as to these two ordinances are supplemented by a statement of certain so-called perpetual franchise ordinances on certain streets. The two ordinances, above referred

to, are each for the term of twenty-five years. The ordinances were duly accepted by the grantees thereof. Under the provisions of the Blanket Franchise Ordinance the grantee and its successors are required to issue and sell eight tickets for twenty-five cents, and give universal free transfers. The issue and sale of such tickets continued until August 20, 1918, when, it is alleged, the franchise under that ordinance was surrendered and cancelled by the Railway Company. Under the Central Market Franchise Ordinance the Company issued and sold eight tickets for twenty-five cents, and gave universal transfers, and continued so to do until August 20, 1918, when, it is alleged, the franchise was surrendered and cancelled by the Company.

The bill sets forth allegations as to the extent of the business of the Company—that its railway system includes more than one hundred and ten miles of main track, and supplies the only street railway service in the city of Columbus, except a very limited service furnished by interurban cars running at long intervals upon certain streets, that the Company also supplies power for war and industrial purposes, and is the only commercial company furnishing electricity in the city of Columbus. That Columbus and its suburbs contain a population of more than 250,000 persons, and constitute a large industrial, manufacturing, military, and railroad center. That more than 25,000 persons are employed in the manufacture of munitions, clothing and a great variety of other war materials for use directly by the United States Government, and for the use of others furnishing war supplies to the Government; also large railroad shops in which are employed many thousands of persons engaged in the making and repair of railroad engines, cars, and other equipment used and to be used by the United States Railroad Administration. That a large majority of the employees of these shops do and must depend upon the street railway service of the Company as their means of transportation to and from their places of employment; and in said area is located the Columbus Barracks in which are quartered more than one hundred thousand recruits per annum, who also are dependent upon said street railway service. That the discontinuance or impairment of the plaintiff's street railway service would cause irreparable harm to the Government of the United States, to the city of Columbus and to all persons dependent upon the service. That the Company has more than twelve million

dollars invested in the street railway lines and equipment. It has large amounts of outstanding mortgage bonds, of which the sum of $7,295,000 is chargeable against its street railway property, the annual interest charged being more than $333,000. The operation and management of the Company show increased and increasing costs of operation and decreased and decreasing net revenue as a result of the war in which the United States was then engaged. The bill charges increases in the cost of coal and in wages paid to the employees. The net earnings of the operations of the lines for the twelve months ending June 30, 1918, after deducting operating expenses, taxes and a proper charge for depreciation were $301,-987, an amount insufficient by more than $31,000 to pay the interest on the outstanding bonds of the Company, properly chargeable to the railroad property, and barely enough to pay 2½% on the value of the property employed by the Company in furnishing street railway service to Columbus. That in June, 1918, the street railway employees of the Company demanded an increase in wages, and inaugurated a strike, which resulted in the discontinuance of the service of the Company for two days. That the controversy was referred to the National War Labor Board, which Board on July 31, 1918, rendered its decision increasing the wages of the street railway employees more than 50%, thereby increasing the operating expenses of the street railway line by about $560,000 per year. It is averred that as a result of such operations for the current year ending June 30, 1919, the gross earnings will fall short of paying expenses, depreciation, and taxes by approximately $250,000, and that there will be no earnings from which to pay its interest charges, or to yield any return to the Company on the value of its property. That on August 20, 1918, the Company surrenderd and cancelled its Blanket Franchise and its Center Market Franchise by notification in writing addressed to the City of Columbus, the Mayor, Council and Clerk thereof. The Company charges that the rates of fare prescribed by the terms and conditions of the two ordinances were not either before or when said franchises were surrendered as above stated, and would not be if longer enforced against the Company, sufficient to enable it to maintain its street railway property in good order and repair and to perform its duty as a public utility; that the further operation of the street railway lines in the city of Columbus under the two ordinances would be not only impracticable but

impossible, and that the enforcement of the said rates of fare would violate the Fourteenth Amendment to the Constitution of the United States. That said rates of fare are inadequate and confiscatory, and their enforcement will deprive the Company of its property without due process of law. The Company charges that the defendants, unless enjoined, will attempt to force it to continue to operate its street railway lines under the said Blanket and Center Market Franchises in violation of rights secured to it by the Fourteenth Amendment to the Constitution. The amended bill further sets forth that controversies, confusion, risks, and multiplicity of suits will result from the resistance of the Company to the enforcement of the inadequate and confiscatory rates of fare prescribed in said ordinance. The bill prays for an injunction restraining the defendants from compelling the Company, or attempting so to do, to operate its lines of street railway in the city of Columbus under the said ordinances; from in any way forcing, compelling, or attempting to compel it, to charge and collect only the rates of fare prescribed by the two ordinances for carrying passengers, and from interfering in any way with the operation by the Company of the lines of street railway covered by the said perpetual franchises.

In the written notice of surrender of the franchises, attached to the bill as part thereof, the alleged facts as to the operation of the Company are set forth much as stated in the amended bill, and the award of the National War Labor Board is set out. The request of February 25, 1918, to the City Council to authorize the Company to charge higher rates, is stated, which was refused, as was a later request. A recital of the recommendation of the War Labor Board for increased rates of fare is also set out in the written notice. The statement is made that the Company refused to continue the issue and sale of tickets as prescribed in the Blanket Franchise and Center Market Ordinances and to longer operate its cars thereunder; that in order to give good street railway service to the people of Columbus the Company will continue to operate the street railway lines, but not under the two franchises or either of them, upon all of the streets of the city, until notified by it to withdraw from those streets not covered by the aforesaid perpetual franchises, and the Company gave notice that it would thereafter charge 5 cents for a single ride and one cent for each transfer.

The District Court held that the bill made no case properly invoking the jurisdiction of a federal court upon constitutional grounds; that upon the merits, which the District Court considered, the bill should be dismissed for want of equity.

As to the jurisdiction of the court: If the court had decided the case upon the question of jurisdiction alone, that question should have been certified here, and none other would have been presented upon such appeal. (Judicial Code, Sec. 238). As we have said, the court decided the case upon the merits, and dismissed the bill. As a constitutional question is involved the appeal brings the whole case here. We are of opinion that there was jurisdiction in the District Court to entertain the bill as it presented questions arising under the Fourteenth Amendment to the Federal Constitution not so wholly lacking in merit as to afford no basis of jurisdiction. Jurisdiction does not depend upon the decision of the case, and should be entertained if the bill presents questions of a character giving the party the right to invoke the judgment of a federal court. We think the elaborate and careful opinion of the District Judge of itself shows that substantial questions arising under the Federal Constitution were presented by the bill and that the court had jurisdiction.

Upon the merits the decision of the case turns upon the nature and character of the ordinances granting the twenty-five year franchises. The theory upon which the bill was framed, and the case argued here by appellant, is that the grants were legislative in character, and gave to the Railway Company the right and privilege of using the streets of the City for a period of twenty-five years; that to compel their operation at unremunerative rates is to take the property of the Company without due process of law in violation of the Fourteenth Amendment. The insistence on the part of the City is that under the controlling laws of Ohio, in force when these ordinances were passed and accepted, and the terms of the ordinances, binding contracts were created, obligating the city, which had authority from the State for that purpose, to permit the operation by the Company upon the streets of the City for the period of twenty-five years upon the terms and conditions set forth in the ordinances.

That a city, acting under state authority, may in matters of proprietary right make binding contracts of the nature contained

in these ordinances, is well established by the adjudications of this court. *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U. S. 496.

Whether these ordinances constituted such contracts depends upon the proper construction of the statutes of Ohio in force at the time, and the terms of the ordinances in question.

It is conceded that the statutes of Ohio regulating this matter are substantially the same as those set forth in the margin of the report of the decision of this court in *Cleveland* v. *Cleveland City Railway Co.*, 194 U. S. 512. After the consideration therein given them, it would be superfluous to state them again or to undertake to repeat the reasons which impelled the decision of the court. In the Cleveland case this court held that upon acceptance of the ordinance it became a binding contract, governed by the rates of fare authorized to be charged during the period of twenty-five years for which the ordinance ran; that the rates contracted for became binding upon the city, and could not be altered by subsequent municipal action consistently with the constitutional rights of the railway company. Summing-up the matter this court said: "In reason, the conclusion that contracts were engendered, would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time and no reservation was made of a right to alter, that by those ordinances existing rights of the corporations were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitation of time which the ordinances contained, and the fact that a written acceptance by the corporations of the ordinances was required, we can see no escape from the conclusion, that the ordinances were intended to be agreements binding upon both parties, definitely fixing the rates of fare which might be thereafter charged." (194 U. S. 536).

While the precise question now involved was not presented to the court in *The Interurban Railway & Terminal Company* v. *The Public Utilities Commission*, 98 Ohio State,—S. C. 16 Ohio Law Reporter, 393, it is evident that the Supreme Court of Ohio takes the same view of the effect of such ordinances as was declared by this court in the Cleveland case. In the opinion in the Interurban Railway case the previous Ohio cases, as well as the decisions of this court, are reviewed and the conclusion as to the effect of the Ohio statutes is in accord with that announced by this court.

The ordinances involved in this case are specific in their terms, and in the so-called Blanket Franchise Ordinance they obligate the Company during the life of the franchise to furnish adequate and efficient service and first-class, commodious cars for the accommodation of its patrons. The Company is authorized to charge certain fares during the term named, and no more. It is required to run cars upon certain streets, not in excess of certain intervals. Upon the expiration of the franchise the Company, unless a further renewal be granted, was obligated to remove its tracks, etc., from the streets of the city, leaving the same in good condition.

In the Central Market Franchise Ordinance the time was fixed for the running of the cars, and the size of the trains was regulated. The Company was obligated to pay the City 2% of the gross receipts from local passenger fares during the term of the franchise. The grant was expressly limited to twenty-five years. Upon the expiration of that period the City had a right to purchase upon giving notice two years before the expiration of the term of its intention to do so. We can have no doubt that under the authority of the laws referred to and in view of the terms of the ordinances in question and the acceptances by the grantees the city of Columbus made valid and binding contracts with the Companies, binding for the term of twenty-five years. By these contracts, obligatory alike upon the City and the Company, the City granted the right to use the streets and the Company bound itself to furnish the contemplated service at the rates of fare fixed in the ordinances. We cannot agree with the contention of the appellant that these were permissive franchises, granted and accepted with the right upon the part of the Company to abandon the uses and purposes for which the franchises were granted because the rates fixed became unremunerative as alleged in the amended bill. The authority under which the city acted came from the State, and was granted by proper statutes passed for that purpose. The contracts were made between the City and the Company, and became mutually binding for the period named in the ordinances. This case does not involve the remedies which may be invoked against a street railway company which is or may become insolvent because of conditions arising since it entered into a given contract. The Company seeks now by its own action to terminate the contracts, still binding upon it by their terms as to rates of fare to be charged, and seeks to have the aid of a court of equity by enjoin-

ing the City from any further requirement of service under them.

There is no showing that the contracts have become impossible of performance. Nor is there any allegation establishing the fact that taking the whole term together the contracts will be necessarily unprofitable. This case is not like the *Denver Water Works* case, 246 U. S. 178, and the *Detroit Street Railway Company* case, 248 U. S. 429, in both of which the franchise to use the streets of the city had expired by limitation, and it was sought to require continued operation of a waterworks system in the one case and in the other of a street railway system, under rates which would afford no adequate return to the companies. In this case the Company seeks the aid of a court of equity to avoid contracts duly made and entered into while the same are yet in force.

We are unable to find in the allegations in this bill any statement of facts which absolves the company from the continued obligation of its contracts unless the facts to which we have referred bring the case, as is contended, within the doctrine of *vis major*, justifying the company in its attempt to surrender its franchise, and be absolved from further obligation.

We come then to consider whether the amended bill shows the happening of an event or events which have released the Company from the obligations of the contract, and authorized it to cancel the same upon the surrender of its franchise. Justification for that course is said to exist in the conditions following the World War and resulting therefrom, particularly, in the great increase in wages by the arbitral award of the War Labor Board which was due to the necessity of meeting the high cost of living as a direct result of war conditions. This, it is contended, presents a situation that made the subsequent keeping of the contract practically impossible except at a ruinous loss to the Company. It is insisted that the principle recognized by this court in *Kronprinzessin Cecilie*, 244 U. S. 13, when applied to this case shows the existence of conditions excusing the performance of the contract. In that case it was held that the master and owner of the German steamship Kronprinzessin Cecilie were justified in apprehending that she would be seized as a prize if she completed her voyage to Plymouth and Cherbourg on the eve of the war, and her return to this country was a reasonable and justifiable precaution in view of the situation; that there was no liability for the shipments of gold agreed to be carried in that case; that the contract, not mak-

ing an exception in the event of war intervening before delivery of the cargo, the circumstances showing peril of belligerent capture afforded an implied exception to the carrier's undertaking.

Much reliance is had by the appellant on the language used by Mr. Justice Jackson speaking for this court in *Chicago, Milwaukee & St. Paul Rwy. Co.* v. *Hoyt*, 149 U. S. 1, 14, 15, wherein it was said: "There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the nonperformance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

Particular reliance is had upon the last sentence of the paragraph just quoted. This language was used in interpreting a contract of doubtful import, as the context shows. Such interpretation was made in view of the situation of the parties at the time when the contract was made, and in view of the nature of the undertaking under consideration. It certainly was not intended to question the principle, frequently declared in decisions of this court, that if a party charge himself with an obligation possible to be performed, he must abide by it unless performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties will not excuse performance. Where the parties have made no provision for a dispensation, the terms of the contract must prevail. *United States* v. *Gleason*, 175 U. S. 588, 602, and authorities cited; *Carnegie Steel Co.* v. *United States*, 240 U. S. 156, 164, 165. The latest utterance of this court upon the subject is found in *Day* v. *United States*, 245 U. S. 154, in which it was said: "One who makes a contract can never be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking. The modern cases may have abated somewhat the absoluteness of the older ones in determining the scope of the undertaking by the literal meaning of the words alone. The Kronprinzessin Cecilie, 244 U. S. 12, 22. But when the scope of the undertaking is fixed, that is merely

another way of saying that the contractor takes the risk of the obstacles to that extent."

In the present case the terms of the contract are not doubtful. The term for which the Company was given the right to use the streets of the City was definitely stated, and the terms, including the rates of fare which the Company might charge, were explicitly laid down. There is no occasion to interpret general terms in the light of the intention of the parties or the circumstances of the case.

In the *Kronprinnzessin Cecilie* case the unexpected event which excused performance was the imminent danger of the capture of the vessel by a belligerent which would have ended the possibility of performing the contract.

In *Metropolitan Water Board, Appellant* v. *Dick, Kerr & Co., Ltd., Respondent,* decided by the House of Lords November 26, 1917, 1918 A. C. 119, a firm of contractors concontracted with a Water Board to construct a reservoir to be completed within six years, subject to a proviso that if by reason of any difficulties, impediments, or obstructions howsoever occasioned the contractor should in the opinion of the engineer, have been unduly delayed or impeded in the completion of the contract, it should be lawful for the engineer to grant an extension of time for completion. By a notice given by the Ministry of Munitions in February, 1916, in exercise of the powers conferred by the Defence of the Realm Acts and Regulations, the contractors were required to cease work on their contract, which they did. It was held that the provision for extending the time did not apply to the prohibition of the Ministry; that the interruption created by the prohibition was of such a character and duration as to make the contract when resumed a different contract from the contract when broken off, and that it had ceased to be operative. In that case there was a direct intervention of the power of the Government, a feature not appearing in the case now under consideration.

It is undoubtedly true that the breaking out of the World War was not contemplated, nor was the subsequent action of the War Labor Board within the purview of the parties when the contract was made. That there might be a rise in the cost of labor, and that the contract might at some part of the period covered become unprofitable by reason of strikes or the necessity for higher wages might reasonably have been within their

contemplation when the contract was made and provisions made accordingly. There is no showing in the bill that the War or the award of the War Labor Board necessarily prevented the performance of the contract. Indeed, as we have said, there is no showing, as in the nature of things there cannot be, that the performance of the contract, taking all the years of the term together will prove unremunerative. We are unable to find here the intervention of that superior force which ends the obligation of a valid contract by preventing its performance. It may be, and taking the allegations of the bill to be true, it undoubtedly is, a case of a hard bargain. But equity does not relieve from hard bargains simply because they are such. It may be that the efficiency of the service and fairness in dealing with the Company which performs such important and necessary service ought to require an advance in rates; such was the strongly announced opinion of the War Labor Board. But these and kindred considerations address themselves to the duly constituted authorities having the control of the subject matter.

We reach the conclusion that the District Court was right in holding that this bill presented no grounds absolving the Company from its contract, and justifying the surrender of its franchise. It follows that the decree is

*Affirmed.*

A true copy.

Test:

*Clerk Supreme Court, U. S.*

# SUPREME COURT OF THE UNITED STATES.

No. 739.—October Term, 1918.

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|---|---|
| I. Tucker Burr et al., Partners, Doing Business Under the Firm Name and Style of Parkinson & Burr, Appellants, *vs.* The City of Columbus, Ohio, et al. | Appeal from the District Court of the United States for the Southern District of Ohio. |

[April 14, 1919.]

Memorandum by direction of the Court, by Mr. Justice Day.

This case was argued and submitted with No. 715, just decided. It was brought by owners and holders of more than $200,000 of certain Mortgage Bonds of the Street Railway Company. The bill alleged diversity of citizenship, and also rights alleged to arise under the Constitution. The case was heard upon motion for a temporary injunction and upon defendant's motion to dismiss the bill. The injunction was refused, the motion to dismiss was granted and a decree entered accordingly. To all intents the case is controlled by the decision in No. 715. The decree of the District Court is

*Affirmed.*

A true copy.

Test:

*Clerk Supreme Court, U. S.*